Pipeline Abandonment Legal Working Group

Legal Issues Relating to Pipeline Abandonment: A Discussion Paper

May 1997

Disclaimer

This Discussion Paper was prepared under the auspices of the Pipeline Abandonment Steering Committee, a Committee comprised of representatives and employees of the Canadian Association of Petroleum Producers (CAPP), the Canadian Energy Pipeline Association (CEPA), the Alberta Energy and Utilities Board (EUB), the Alberta Department of Energy (ADOE), and the National Energy Board (NEB). While it is believed that the information contained herein is reliable, CAPP, CEPA, the EUB, the ADOE, and the NEB do not guarantee its accuracy. Nor does this paper constitute the provision of legal advice. This paper does not necessarily reflect the views or opinions of CAPP, CEPA, the EUB, the ADOE, or the NEB, or any of the member companies of CAPP and CEPA. In particular, the paper cannot be taken to represent the regulatory policy of the EUB or the NEB and may not be relied on for such purpose. The use of this report or any information contained will be at the user's sole risk, regardless of any fault or negligence of CAPP, CEPA, the EUB, the ADOE, or the NEB or of any individual, consultant, or law firm involved in the preparation of this paper.

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Section 1 - Introduction

In April 1994, representatives from Canadian Association of Petroleum Producers (CAPP), Canadian Energy Pipeline Association (CEPA), Alberta Energy and Utilities Board (AEUB), and the National Energy Board (NEB) met to establish to establish a Pipeline Abandonment Steering Committee. It was also decided at that time that separate sub-committees be struck to address the technical, environmental, legal, and financial aspects of pipeline abandonment. The technical and environmental sub-committees were the first to be formed and, together with the Steering Committee, produced, in November 1996, a discussion paper on technical and environmental issues related to pipeline abandonment. The technical and environmental paper reviews abandonment options, outlines regulatory requirements, discusses the technical and environmental issues related to abandonment, and concludes with a discussion of post-abandonment responsibilities. This work led to the identification of a number of questions. As a result, in early October 1996, the Steering Committee struck a Pipeline Abandonment Legal Working Group for the purpose of identifying and examining the legal liability issues related to the discontinuation and abandonment of pipelines and associated facilities related to the oil and gas industry. The working group was requested to provide a discussion paper of the legal issues related to pipeline abandonment. Membership was to include CAPP, CEPA, the EUB, Alberta Energy and the NEB. The Steering Committee identified a number of legal issues which it wished the working group to consider, recognizing that this was not exhaustive. A copy of the Terms of Reference of the Pipeline Abandonment Legal Working Group, including issues identified for consideration by the working group, is attached as Appendix 1.

The working group held its inaugural meeting on October 29, 1996 and continued to meet regularly thereafter for the purpose of completing this discussion paper. The Terms of Reference of the working group contemplated close liaison with other stakeholders. Invitations to participate in the discussions of the working group were extended to the provinces of British Columbia, Saskatchewan, Manitoba, Ontario, and Quebec. Each of the provinces expressed interest and decided to be observers.

The members of the working group are as follows:

Greg Cartwright - Canadian Energy Pipeline Association
Ron Girvitz (Oct/96-Jan/97); Tania Donnelly (Feb/97 to date) - Alberta Energy and Utilities Board
Peter Noonan and Claire McKinnon - National Energy Board
Jill Page - Alberta Department of Energy
Nick Schultz - Canadian Association of Petroleum Producers (chairman)

Observers:

Jim Colgan - British Columbia Ministry of Employment and Investment
Bob Dubreuil - Manitoba Energy & Mines
Thomson Irvine - Saskatchewan Department of Justice
Lise Proulx - Ministre des Ressources Naturelles
John Turchin - Ontario Ministry of Environment & Energy

The outline of Alberta legislation which is contained in Appendix 2 is the work of Tania Donnelly and Jill Page. The outline of the NEB Act contained in Appendix 3 is the work of Peter Noonan and Claire McKinnon. The discussion of liability and land registration issues contained in Appendix 4 was produced at the request of Greg Cartwright, at the expense of Interprovincial Pipe Line Inc., by Bernard J. Roth of Milner Fenerty. In addition, Greg Cartwright surveyed CEPA member companies and land registry offices to determine whether land registry offices maintained pipelines plans in an accessible form.

At the outset, the working group recognized that none of the participants could bind their employers to any particular course of action and, particularly those employed by regulatory agencies, could not tie the hands of the regulator. The purpose of this paper, therefore, is to identify and discuss various legal issues related to pipeline abandonment. Where, having regard to relevant legislation and regulatory or judicial precedents, the answer to a particular issue is clear, then this is identified in the discussion paper. Likewise, any area in which the law is unclear, or the subject of differing views, or simply non-existent, is also identified. The goal of the discussion paper is to share information and insights with a view to providing practical information to the Steering Committee and, ultimately, perhaps for the benefit of those who will shape or make decisions related to pipeline abandonment.

Section 2 - The Central Issues

Pipelines are typically constructed and operated pursuant to legislation especially designed for the purpose of ensuring the protection of public safety and the environment, among other things. During the life of a pipeline, there is a company with active and effective control over the operations of the pipeline and those operations are subject to oversight by a regulatory body exercising powers under the specialized legislative scheme. This is the case with pipelines both in Alberta and, federally, under NEB jurisdiction. Other provinces also have specialized legislative regimes applicable to pipelines.

The specialized legislative regime takes precedence over other laws of more general application. Where an issue is covered by the special legislation, general legislation which is inconsistent with the special legislation will cease to apply. However, specialized pipeline legislation does not address all the issues that may arise during the operating life of a pipeline. Nor are general laws always inconsistent with special laws. Oil spills, for example, will attract both the attention of the specialized pipeline regulator and also the attention of those responsible for enforcing more general environmental protection legislation. In addition, the spill may attract liability under common law principles both in tort, negligence or nuisance, and also contract where, for example, the pipeline has acquired a right-of-way from a landowner and has undertaken contractually to be responsible for any damage.

As noted above, specialized legislation takes precedence over general legislation to the extent of inconsistency but can also operate harmoniously with general legislation. Whether the special takes precedence over the general or the two can operate harmoniously is a question of interpretation. Where the question is the application of provincial legislation in relation to federal legislation, the constitutional doctrine of "paramountcy" also applies. Stated simply, in a case of conflict, federal law takes precedence over provincial law. For example, if a federally regulated railway were specifically required, under federal law, to burn weeds on its right-of-way, then provincial law prohibiting the burning of weeds would not

apply. Federal laws governing railways do not specifically require burning of weeds but require only that weeds be controlled. This requirement can co-exist with provincial laws prohibiting burning.[1]

[1] See e.g. Ontario v. Canadian Pacific Railway Limited, [1995] 2 S.C.R. 1028 (Jan.24 1995).

Federal laws and provincial laws can, therefore, operate harmoniously where the provincial law does not conflict with the federal law. This is also a matter of interpretation. So, for example, an oil spill from a rupture of a federally regulated pipeline could also attract liability under provincial environmental protection legislation if, for example, prompt and proper steps were not taken to clean up the spill. Determining legal responsibility is one thing. The responsible party must also, as a matter of fact, be available and have the ability to act. In the case of an operating pipeline, the pipeline operator is there to do the cleanup and make good on the loss. This is reinforced by the presence of a specialized regulator with primary responsibility to ensure that the operator does what should be done in relation to the pipeline.

Federal laws and provincial laws can, therefore, operate harmoniously where the provincial law does not conflict with the federal law. This is also a matter of interpretation. So, for example, an oil spill from a rupture of a federally regulated pipeline could also attract liability under provincial environmental protection legislation if, for example, prompt and proper steps were not taken to clean up the spill. Determining legal responsibility is one thing. The responsible party must also, as a matter of fact, be available and have the ability to act. In the case of an operating pipeline, the pipeline operator is there to do the cleanup and make good on the loss. This is reinforced by the presence of a specialized regulator with primary responsibility to ensure that the operator does what should be done in relation to the pipeline.

There is, therefore, in the case of an operating pipeline, a clearly identifiable legal and factual locus of control and responsibility for the pipeline in the pipeline operator which is supported by effective oversight under the special legislative scheme. Abandonment can change the legal and factual locus of control and responsibility and may also involve the termination of special regulatory oversight.

The goal of a sound abandonment plan is, in essence, to put the abandoned line into a condition where, if the line is abandoned in place, the risk to public safety and the environment in the years to come is at an acceptable level. It follows, from a legal perspective, that the essence of the legal question is to determine whether the specialized laws that govern pipelines do or do not support the maintenance of effective control over the line by the pipeline operator in light of the risk of any undesirable future event related to a line abandoned in place from the perspective of public safety and environmental protection. There is also an issue as to how laws of general application, including common law, may apply should something unfortunate happen and damage result.

In that regard, several general areas require examination. Where abandonment leads to the pipeline company ceasing to have ownership or control of the line, there is an issue as to whether landowners are aware of and accept this consequence of abandonment. Where abandonment leads to the termination of a specialized regulatory regime, there is an issue as to whether those responsible for enforcing laws of general application are aware of this situation and are in a position to exercise their authority effectively. This is especially so where the specialized regulatory regime is federal such that the termination of federal oversight results in potentially increased responsibility at the provincial level in respect of laws of general application.

Section 3 - Overview

This section contains an overview of the information contained in the Appendices.

National Energy Board

A company authorized to operate a pipeline may not abandon the operation of the pipeline without leave of the NEB. The NEB is explicitly authorized under the NEB Act to make an abandonment order subject to the satisfaction of conditions precedent but has no explicit authority to attach conditions subsequent to an abandonment order. That is, the NEB can make the abandonment order come into effect at a future time where the various steps involved in abandoning the line have been completed. However, the absence of an express provision to impose conditions which would continue after the abandonment order comes into effect, has led the NEB to conclude that it has no authority to attach conditions subsequent to an abandonment order.[2]

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[2] NEB Reasons for Decision, MH-1-96, Manito Pipelines Lytd., July 1996. This decision is presently ythe subject of a leave to appeal application to the Federal Court of Appeal brought by an intervenor in the Manito proceeding.

The NEB has the power to make regulations governing the abandonment of a pipeline. The current regulations [3] are relatively brief in nature and are both procedural and technical in nature. The regulations are consistent with the NEB exercising a broad public interest discretion to deal with abandonment on the facts of the particular case. To the extent that the current regulations include technical provisions, such as the continuation of cathodic protection after the line is abandoned, there is a question as to the scope of these provisions in light of the interpretation of the NEB Act found in the Manito decision.

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[3] The regulations are currently under review and may be amended.

A company has the power, for the purposes of its pipeline undertaking, and subject to the NEB Act, to sell or dispose of any of its land or property that has become unnecessary for the purpose of the pipeline or may discontinue any of its pipeline works. The Manito case involved the abandonment of a line in place together with a decision by the pipeline company that the line and the related land was unnecessary for the purpose of the pipeline. The NEB determined that, upon the abandonment order coming into effect and the pipeline company declaring the property in which the abandoned pipeline is situated to be surplus to pipeline requirements, NEB jurisdiction over the abandoned pipeline would come to an end. As a result, the NEB has adopted a regulatory approach of requiring pipeline companies to satisfy conditions precedent before an abandonment order can take effect. The condition precedent regulatory approach was applied in 1996 in the Manito Pipeline Ltd. abandonment application and in an application by Yukon Pipeline Limited for leave to abandon the Canadian portion of the Skagway, Alaska to Whitehorse, Yukon oil pipeline.

There does not appear to be a clear NEB precedent with respect to a situation where, although a section of line is permanently abandoned in place , the company retains the land for the purposes of an ongoing pipeline undertaking. This may occur where the company operates multiple lines in a common easement.

The operators of NEB pipelines almost universally are the owners or have an ownership interest in the pipeline. There are many practical reasons why this is the case. However, it is possible under the NEB Act

that a non-owner could obtain authorization to construct and operate a pipeline. There may be perfectly good reasons why such an arrangement would be sensible and proper. There are also complexities, for example, land acquisition or financing, which make this unlikely in the case of any major pipeline. The distinction between ownership and operation is noted simply because, in a case where NEB jurisdiction comes to an end, ownership may become more significant in determining liability in respect of any event which may occur subsequent to the line being abandoned.

The question of notice of an abandonment application is a matter in the discretion of the NEB. The NEB determines, on a case by case basis, the persons to whom notice should be given. As a general matter, however, in cases where landowners may be affected, the NEB does seek information from an applicant with respect to the process followed by the company in dealing with landowners and landowner concerns.

The pipeline operator may hold the land rights necessary for the operation of its line by agreement with landowners or by a right of entry order issued by the NEB.

Alberta

In Alberta, a person authorized to operate a pipeline is granted a licence. The licensee may not abandon the line without approval from the EUB. The regulations require that an application for abandonment include information with respect to the ownership after abandonment, where it is abandoned in place, and information as to the notification given to landowners and occupants affected by the proposed abandonment.

If authority to abandon is granted, the regulations provide that the licensee continues to be responsible should anything further become necessary in respect of the abandoned line in the future. No time limit is specified. The licencee remains responsible in perpetuity.

The EUB presently has no express authority to order a licencee to abandon a pipeline but has ordered pipelines to be abandoned under its general power to make orders necessary to give effect to the purposes of the Energy Resources Conservation Act. The issue has been reviewed by the Orphan Facilities, Pipelines and Reclamation Sub-Committee.

A licensee will generally be the owner or have an ownership interest in the line but a licence can be granted to a non-owner.

The land rights required for the operation of a pipeline may be obtained by agreement with landowners or by a right of entry order issued by the Surface Rights Board.

Reclamation is governed under the Alberta Environmental Protection and Enhancement Act. This Act, together with the regulations, imposes an obligation on a pipeline operator to reclaim any land that is being or has been used or held in connection with the construction, operation, or reclamation of the pipeline. The definition of an operator under this Act is broader than that of a licencee under the Pipeline Act. At one time, the regulations were worded to include an explicit reference to "the construction, operation or reclamation of an extra-provincial undertaking". This language could have applied to a pipeline abandoned pursuant to NEB authority. However, the regulations have recently been amended to delete this reference to extra-provincial undertakings. This amendment may suggest that the regulations do not apply to pipelines abandoned pursuant to NEB authority, although the issue is not entirely clear.

The reclamation process leads to the issuance of a reclamation certificate. The regulations provide that further reclamation work may not be ordered after the date of the reclamation certificate. A right of entry order or an easement remain in effect until the reclamation certificate is issued. The obligations of the pipeline licencee under the Pipeline Act will, however, continue in perpetuity.

Contractual Liability

The contractual arrangements with landowners may provide for reclamation, payment of damages, indemnity and other liability. Such provisions would typically be included in a right-of-way agreement. The contractual obligations with respect to reclamation, damage, indemnity and liability may survive abandonment of the pipeline and the termination of the right-of-way. As a result, depending on the particular agreement, a landowner may have contractual rights which continue after the line has been abandoned and the right-of-way has terminated.

Tort Liability

The failure of a pipeline company to meet the relevant standard of care in abandoning the pipeline could result in liability to anyone suffering loss as a result although a pure economic loss may not be compensable. The landowner may, depending on the circumstances, also be responsible for any injury or damage caused by improper abandonment but could likely receive contribution and indemnity from the pipeline company.

NEB Act Liability

Section 75 of the NEB Act provides that a pipeline company make full compensation for all damages from its pipeline operations. Although it is unlikely that this provision continues to have application if, as a consequence of an abandonment, the NEB Act ceases to apply to that pipeline, it is also true that similar obligations may arise under common law principles.

Surface Rights Act Liability

Section 33 of the Alberta Surface Rights Act gives the Surface Rights Board authority to order a pipeline operator to pay compensation, not exceeding $5000, for damage caused by the operations of the operator.

Land Registration Issues

Under the land titles system, the registration of a discharge of a right-of-way agreement would rid the title of the registration. However, the cessation of a right-of-way does not lead to automatic registration of a discharge since someone must take the step of registering a discharge. To determine if there had been a pipeline right-of-way on the property after a discharge has been registered, it would be necessary to do an historical search in respect of that property. Historical searches are not commonly done in land titles jurisdictions so that the presence of an abandoned line on the property may not come to the attention of a purchaser through the land titles system. Knowledge of the presence of the line would likely depend on the purchaser's general knowledge of the area or upon disclosure by the vendor.

Where a right of entry order remains in effect then this will be reflected on the title.

The plans, profiles, and books of reference which NEB pipeline companies are required to file with land registrars are maintained as a permanent record by the various registry and land titles offices. A title search under a registry system would disclose the presence of these plans and the plans could then be reviewed. Given the paper burden at many registry offices, actually accessing such records may involve some delay and require some persistence. Under the land titles system, while these records would be maintained in perpetuity, the presence of the abandoned pipeline may not be evident on the title of the property in the absence of an historical search which, as noted, is not customarily done.

In Alberta, the EUB maintains maps of all pipelines under its jurisdiction, both the operational and abandoned lines, in a form which permits a search to be made in relation to a specific property. NEB regulated pipelines in Alberta are also shown on these maps.

Section 4 - Discussion and Observations

Response to Questions from the Steering Committee

1. Questions 1, 8 and 9:
   If a caveat is removed, does ownership of the pipeline revert to the landowner?
   Under what conditions would the land title caveat be released for an abandoned pipeline?
   Should someone be responsible to ensure a caveat is released, if appropriate?

   (Response to 1, 8, & 9) Termination of the right-of-way may result in ownership of the pipeline reverting to the landowner. This will be by virtue of the terms of the right-of-way agreement and the fact of abandonment. As with a mortgage which has been paid off but not formally discharged, the right-of-way agreement could remain registered against the title if no active step is taken to discharge the registration. However, under Alberta law, where there is no right-of-way agreement but a right of entry order instead, then it is doubtful that the owners of the land would have any ownership in the line after abandonment. In Alberta the pipeline licencee has a perpetual obligation in respect of a line abandoned in place. In addition, where the pipeline company owns the land outright then the issue does not arise.

2. Question 2:
   Should a landowner be obliged to accept ownership and understand liability before a caveat is removed?

   The landowner's rights will normally have been established at the time the right-of-way agreement has been entered into. Under Alberta law, if there is no agreement but a right of entry order instead, the landowner will not likely acquire any ownership. This is because, although the rights to the land will revert to the landowner, the pipeline licencee remains responsible for the pipeline under the Pipeline Act and has a right to enter the land if needed to carry out that responsibility. It may be, therefore, under the Alberta scheme that the landowner never acquires any ownership rights or liabilities in the pipe. At the federal level, the right of entry order would terminate with the termination of NEB jurisdiction. As discussed, NEB jurisdiction has been determined to come to an end with the coming into effect of an abandonment order and the declaration of the pipeline company that the land is surplus to pipeline requirements. At that time, the pipeline could appear to become a part of the land owned by the landowners although this could require the pipeline company to take a positive step in furtherance of its declaration that the land is surplus to pipeline requirements, for example, by registering a quit claim deed. The landowner's awareness of the abandonment taking place, together with the contractual and regulatory implications of abandonment, will be a function of the procedure followed during the abandonment process.

3. Questions 3, 4, and 5:
   Who is responsible for granting approval to cross abandoned pipelines?
   Is a crossing agreement necessary, if a pipeline is properly abandoned?
   Should a crossing agreement be required, if ownership is transferred to landowner and caveat removed?

   (Response to 3, 4, & 5) If at the federal level regulatory jurisdiction over the line ceases as a

consequence of abandonment and a subsequent declaration of the pipeline company that the lands are surplus to pipeline requirements, then any federal regulatory requirements for crossings also cease. The line abandoned in place simply becomes a part of the land. In the absence of a declaration by the company that the lands are surplus to pipeline requirements, a crossing agreement would be required. In Alberta, a crossing agreement may be required since an abandoned pipeline remains subject to regulatory authority, however, this is not usually a matter of practical concern.

4. Question 6:
Who is responsible for further abandonment requirements at a later date, such as when removal is necessitated by land development?

In the absence of clear statutory authority, the land developer would be responsible for doing what is necessary in respect of the development. In this respect, the removal of pipe in the ground would be similar to the removal of trees and rocks or the foundations of a previous building on the site. In Alberta, there is statutory authority on this issue. The EUB retains jurisdiction to determine whether the pipeline licencee or the developer should bear the costs of removing the pipe.

5. Questions 7, 12 and 13:
What is the extent of corporate liability on abandoned in-place pipelines and how long should it continue?
What are the corporate liabilities (environmental damage, personal injury) for pipeline abandonment?
If a pipeline is left in the ground, can a pipeline company ever eliminate its long-term liability?

(Response to 7, 12, & 13) As noted above in the Overview, the liability of a pipeline company may continue, post abandonment, as a result of continuing contractual obligations or through the application of principles of tort liability. Environmental contaminants legislation also generally has the ability to reach back in the event there was a failure to follow proper abandonment procedures and contamination resulted. Under the Alberta pipeline abandonment regulations, there is the possibility for further orders to be made post-abandonment with the result that there is a perpetual liability in the licencee.

6. Question 10:
Should procedures be developed to deal with orphan pipelines that are similar to those being developed for orphan wells?
The question of orphan pipelines is an issue related to a factual problem. That is, the legally responsible party is no longer available, as a matter of fact, to make good on the legal obligation. This is, therefore, primarily a policy not a legal question. However, where regulations do not require that an unused line should, at some point, be abandoned, then the absence of such a legal requirement could contribute to the creation of orphans. In addition, the legal obligation on the part of a pipeline operator may exceed the life in fact of the operator. The degree of concern on this issue may also depend on the particular circumstances. As noted above, the goal of a sound abandonment plan is to put the abandoned line into a condition where, if abandoned in place, the risk to public safety and the environment in the years to come is at an acceptable level. Some lines may in fact pose no real risk following a proper abandonment. Also, as noted above, in Alberta the Orphan Facilities, Pipelines and Reclamation Sub-Committee is reviewing the concern regarding orphan production lines. The larger transmission lines are outside the scope of the sub-committee's work.

7. Question 11:
Under what conditions would a licence or approval be cancelled after abandonment?

Under the NEB process, the order granting abandonment has the effect of terminating the approvals given to operate the line. In Alberta, the status of the line changes with the granting of approval to abandon but the licence does not terminate and the licencee remains liable for further orders of the

EUB. This applies regardless of whether the pipeline is abandoned in place.

8. Question 14:
What, if any, are landowner obligations with respect to an abandoned pipeline?

A landowner, as noted above in the Overview, may be liable in the event of loss or injury suffered as a consequence of improper abandonment, subject to a right of contribution and indemnity against the pipeline company. Environmental contaminants legislation might also impose obligations on a landowner in the event of contamination resulting from improper abandonment. In Alberta, the pipeline licencee remains liable in perpetuity with the result that the landowner may not acquire any liability.

9. Question 15:
Is signage required at locations of abandoned pipelines?

Signage is a common regulatory requirement and, in Alberta, the signage obligation continues after abandonment. However, if regulatory jurisdiction ceases then the regulatory requirement for signage would also cease. Signage is, quite apart from regulatory requirements, a prudent practice in respect of an operating pipeline. If it were sound practice in respect of the particular circumstances of an abandonment to maintain signage, then the maintenance of signage would be supported by the potential liability which could be attracted if someone suffered damage which was contributed to by the lack of signage. In other words, principles of tort liability may reinforce a practice of signage if, as a matter of fact, signage were the prudent industry practice.

Post-Abandonment Regulatory Oversight

As seen in the Overview, above, there are differences between the federal and Alberta regulatory regimes. The Alberta regime provides for perpetual regulatory oversight of a line abandoned in place. The licencee is, therefore, subject to a perpetual responsibility for the line. At the federal level, the NEB has determined, in the case of a line abandoned in place coupled with a determination by the pipeline company that the line and the related land are unnecessary for the purpose of the pipeline, that NEB jurisdiction over the line comes to an end. Any continuing legal responsibility for the line would be determined under any applicable provincial legislation, contractual agreements, or principles of tort liability. There is, therefore, a significant difference between the regulatory regimes. The Alberta regime provides for continuing specialized regulatory oversight to address any future unforeseen event, no matter how remote. By contrast, at the federal level, regulatory jurisdiction has been determined to come to an end where the line is abandoned and the pipeline company has determined that the line and associated land are no longer required for the purposes of the pipeline.

As noted in the discussion of the Central Issues, above, the essence of the legal question in the case of abandonment is to determine whether the specialized laws that govern pipelines do or do not support the maintenance of effective control over the line by the pipeline operator until the point at which the risk of any undesirable future event related to a line abandoned in place is acceptable from the perspective of public safety and environmental protection. The policy question raised is whether it is acceptable to relieve the pipeline operator from such risk as may remain, and if so when. In Alberta, regulatory authority continues in perpetuity. Some facilities may be capable of being rendered acceptably safe at the time of abandonment so that there may be little or no concern post-abandonment. The question as to whether continued supervision should be perpetual, or something less, turns on the broader issue of whether, and if so when, it is acceptable to relieve pipeline operators from any residual risk. For example, in the case of many oil and gas facilities which have been abandoned and subject to the reclamation process, the responsibility for further reclamation continues for five years following the issuance of the reclamation certificate. In any review of abandonment procedures which may result from the work of the Steering Committee, it may be desirable to distinguish between those situations which may warrant ongoing

supervision, including the nature and duration of supervision, and those situations which may warrant a different approach. This could be reflected in any revised regulatory requirement. Common law obligations might also be taken into consideration in any such review of regulatory requirements. Consideration might also be given to establishing or authorizing entities whose objective is to provide the care which may be required after a line is abandoned and so assume the obligations and the liabilities.

Where federal regulatory oversight would end on the coming into effect of an abandonment order, the NEB approach is to require that all steps necessary to render the line acceptably safe be taken prior to the coming into effect of the abandonment order. If it were, for the sake of discussion, considered desirable in connection with the particular circumstances of any pipeline to be abandoned that some continuing regulatory oversight should be maintained, then this would occur only by virtue of the application of provincial legislation. It is not clear, in the case of Alberta, that the specialized legislation governing pipelines would have any application to such a situation. In addition, the pipeline operator would undoubtedly be concerned as to the application of conflicting federal and provincial approaches to abandonment. For example, if it were considered by the NEB to be appropriate to abandon a facility in place subject to the pipeline operator taking appropriate steps and incurring the costs associated with those steps, the pipeline operator would wish to be assured that the federal and provincial approaches to the situation were consistent and could operate harmoniously.

Pipeline operators, as well as other affected interests, seek certainty as to the application of the law. The common law carries with it some uncertainty although parties do have some freedom as to how to allocate or manage the risk of future liability. Both the federal and Alberta legislative regimes provide for certainty in some respects but uncertainty in others. The Alberta regime provides the certainty of perpetual regulatory authority but this implies the uncertainty associated with a perpetual, indefinite obligation. Some certainty with respect to the latter can, as noted, be achieved through the development of more comprehensive abandonment practices and requirements following the work of the Steering Committee. The NEB regime provides for certainty as to the termination of federal jurisdiction while leading to some uncertainty as to the application of provincial laws. One approach to this uncertainty may lie through federal/provincial co-operation. Another approach may involve an amendment to the NEB Act to at least provide an express power to impose conditions subsequent to permit the NEB to establish standards of care for a reasonable period of time in the post-abandonment period where circumstances warrant. It may also be desirable to consider amendments that would provide a specific power to prevent a pipeline operator from declaring abandoned pipelines, including pipeline right-of-way, to be surplus to pipeline requirements or to thereafter divest its property interests. Additional specific powers to provide for the mitigation of third party liability or environmental remediation might also be considered by policy-makers. Revisions to the statutory definition of "pipeline" in section 2 of the National Energy Board Act may also be necessary if such policy views were to be brought to fruition.

Landowner Concerns

As noted above, a landowner may be unaware of the presence of an abandoned pipeline on the land in the absence of an unusual historical search. This is the situation where land registration is under the land titles system. The EUB does maintain a registry which permits a search to be made of the location and status of pipelines in Alberta both under EUB and NEB jurisdiction. This complements the land registration system. Under the Alberta regime, an abandoned line of pipe may never become the responsibility of the landowner. This may lead to a situation where a piece of long-abandoned pipe, which as a practical matter has long since ceased to be of any interest to the regulator or the licencee, may still be subject to the jurisdiction of the EUB.

Under the federal regime, where the NEB ceases to exercise jurisdiction over an abandoned line, the title to the land may be cleared of any right-of-way agreements, and the awareness of any subsequent landowner of the presence of the abandoned line may depend on undertaking an unusual historical search or upon actual

notification from the prior owner. In addition, apart from Alberta, there is no mechanism in place for making provincial authorities aware of the presence of the abandoned line. As noted, the Alberta EUB does maintain a record of NEB pipelines in Alberta which will include the status of the line.

Power to Order a Line to be Abandoned

The Alberta regime does not contain an express provision authorizing the EUB to require a line to be abandoned. However, the EUB has exercised its general powers to order a line, the use of which has been discontinued, to be abandoned and an amendment to the legislation to provide a specific power is being considered. The federal regime also contains no express provision authorizing the NEB to direct that a line be abandoned although the regulations, as presently drafted and, similar to Alberta legislation, do provide that a line which has been inoperational for more than 12 months but which has not been abandoned cannot be reactivated without leave of the NEB. There may be circumstances where it is desirable to order that a line be abandoned. This may assist in preventing a line from becoming an "orphan".

Federal/Provincial Co-operation

In light of the circumstances noted above where the NEB may cease to exercise jurisdiction in respect of an abandoned line, there may be a need for increased federal/provincial co-operation in respect of such lines. This would ensure, among other things, that pipeline operators are not subject to conflicting requirements with respect to abandonment. This would also ensure that provincial authorities are in possession of the information they may need to exercise their appropriate jurisdiction. Amendments to provincial legislation may be required to ensure that provincial authorities can exercise jurisdiction over abandoned lines.

Appendix 1

PIPELINE ABANDONMENT LEGAL WORKING GROUP TERMS OF REFERENCE

Background

The issue of pipeline discontinuation and abandonment and the potential impact to the environment is a concern to industry, regulators and the public. Over the next several years, abandonments will be prevalent as wells and reservoirs are depleted. The Canadian Association of Petroleum Producers (CAPP), the Canadian Energy Pipeline Association (CEPA), the Alberta Energy and Utilities Board (EUB) and the National Energy Board (NEB) have established a steering committee and a number of working groups to address the various issues related to pipeline abandonment.

Mission Statement of the Pipeline Abandonment Legal Working Group

The Pipeline Abandonment Legal Working Group (PAL) with input from the Steering Committee will identify and examine the legal liability issues related to the discontinuation and abandonment of pipelines and associated facilities related to the oil and gas industry and provide a discussion paper of the legal issues related to pipeline abandonment.

Scope

- All pipelines within the scope of the CSA Standard Z662-94 and as identified in the draft document

"Pipeline Abandonment- A Discussion Paper on Technical and Environmental Issues", dated July 1996.

- Facilities associated with the pipelines such as headers, above ground valve assemblies, drip pots, catholic protection beds and sinage, but not above ground facilities, i.e. meter stations, compressor stations, pump stations, etc.
- Identify potential legal liabilities associated with pipe removal or abandonment in place and suggest practical measures to deal with legal concerns. Specifically, review, but not be limited to, the issues identified in **Attachment #1**.
- Maintain close liaison with Steering Committee and other stakeholders to ensure broad input in evaluating the legal liabilities.

Membership

CAPP
CEPA
EUB
Alberta Energy
NEB

ATTACHMENT #1

LEGAL LIABILITIES

The following list of legal issues have been identified by the EUB and members of the Environmental and Technical Abandonment Working Groups. The list may not be exhaustive but should be used as a starting point for review of the legal issues associated with pipeline abandonment.

1. If a caveat is removed, does ownership of the pipeline revert to the landowner?
2. Should a landowner be obliged to accept ownership and understand liability before a caveat is removed?
3. Who is responsible for granting approval to cross abandoned pipelines?
4. Is a crossing agreement necessary, if a pipeline is properly abandoned?
5. Should a crossing agreement be required, if ownership is transferred to landowner and caveat removed?
6. Who is responsible for further abandonment requirements at a later date, such as when removal is necessitated by land development?
7. What is the extent of corporate liability on abandoned in-place pipelines and how long should it continue?
8. Under what conditions would the land title caveat be released for an abandoned pipeline?
9. Should someone be responsible to ensure a caveat is released, if appropriate?
10. Should procedures be developed to deal with orphan pipelines that are similar to those being developed for orphan wells?
11. Under what conditions would a licence or approval be cancelled after abandonment?
12. What are the corporate liabilities (environmental damage, personal injury) for pipeline abandonment?
13. If a pipeline is left in the ground, can a pipeline company ever eliminate its long-term liability?
14. What, if any, are landowner obligations with respect to an abandoned pipeline?
15. Is signage required at locations of abandoned pipelines?

Appendix 2A

ALBERTA ENERGY AND UTILITIES BOARD

PIPELINE ABANDONMENT PROVISIONS

PIPELINE ACT

SECTION 2

2. Except as otherwise provided in this Act, this Act applies to all pipelines in Alberta other than

(a) a pipeline situated wholly within the property of a refinery, processing plant, coal processing plant, marketing plant or manufacturing plant.

(b) a pipeline for which there is in force

(i) a certificate, or

(ii) an order exempting the pipeline from a certificate,

issued or made by the National Energy Board under the National Energy Board Act (Canada).

(d) a pipe transmitting gas or oil for use as fuel from a tank that is situated wholly within the property of a consumer and the installations in connection with that pipe,

(f) a boiler, pressure vessel or pressure piping system within the meaning of the Boilers and Pressure Vessels Act.

RSA 1980 cP-8 s2;1984 c32 s3;1985 c46 s3;1991 cS-06 s70(10)

Commentary

The Alberta Energy and Utilities Board ("EUB") governs the construction, operation and abandonment of pipelines in Alberta pursuant to the *Pipeline Act*, R.S.A. 1980, c. P-8 ("*Pipeline Act*" or "Act"). The scope of application of the Act is set out in the above provision. Subsection (b) exempts pipelines regulated by the National Energy Board ("NEB") as long as there remains an NEB certificate in force in respect of the pipeline. Notwithstanding the Manito decision by the NEB, it is not clear whether pipelines which were regulated by the NEB at one time and which are now abandoned fall within the jurisdiction of the EUB and Alberta Environmental Protection once they have been abandoned.

The Act also defines the term "pipeline" in section 1(1)(s) in the following way:

(s) "pipeline" means a pipe used to convey a substance or combination of substances, including installations associated with the pipe, but does not include

(i) a pipe used to convey water other than water used in connection with a facility, scheme or

other matter authorized under the Oil and Gas Conservation Act or the Oil Sands Conservation Act,

(ii) a pipe used to convey gas, if the pipe is operated at a maximum pressure of 700 kilopascals or less, and is not used to convey gas in connection with a facility, scheme or other matter authorized under the Oil and Gas Conservation Act or the Oil Sands Conservation Act, or

(iii) a pipe used to convey sewage;

The EUB maintains a pipeline mapping service which tracks all pipelines in Alberta, whether abandoned, suspended or in operation. The only exception to the detail of these records is that status (i.e. whether the pipeline is abandoned, suspended or in operation) updates are not currently available for NEB regulated pipelines. However, there is a harmonization initiative with the NEB to incorporate pipeline status information into EUB records in the near future. Members of the public can obtain pipeline mapping, by township, at the EUB's Information Services Department. More detailed mapping is maintained internally by the Board and may be obtained upon special request.

PIPELINE ACT

SECTION 3

3. The Board may make regulations

(e) as to the measures to be taken in the construction, operation, testing, maintenance, repair, discontinuation of operation, removal or abandonment of any pipeline for the protection of life, property and wildlife;

(m) exempting a pipeline or class of pipeline from any provision of this Act or the regulations;

(n) prescribing alternate provisions that may apply to a pipeline or class of pipeline exempted by a regulation made under clause (m);

Commentary

The EUB's regulation-making powers in respect of pipelines are very broad, and pursuant to subsection (e) above, the Board may compel pipeline licensees to protect life, property and wildlife both during and after operations have ceased. The regulations currently promulgated pursuant to subsection (e) are discussed in more detail below.

A second point to make about the EUB's regulation-making powers is that the Board may, by regulation, exempt pipelines or classes of pipelines from application of certain of the Act's provisions. This allows the Board to tailor its pipeline operation and abandonment requirements depending on the circumstances of the particular application.

PIPELINE ACT

SECTIONS 7, 11, 19 and 20

7. (1) No person shall construct a pipeline or any part of a pipeline or undertake any operations preparatory or incidental to the construction of a pipeline unless he is the holder of a permit or unless he is acting pursuant to a direction of the Board under section 34 authorizing him to do so.

11. (1) A permit for a pipeline may be granted by the Board subject to any terms and conditions expressed in the permit or the Board may refuse to grant a permit.

19. (1) No person shall operate a pipeline for any purpose unless he is a licensee.

(2) No person shall operate a pipeline unless the pipeline has first been tested pursuant to the regulations or as otherwise approved by the Board, and been found to be satisfactory.

(3) A permittee is a licensee for the purposes of subsection (1) during the term of the permit and, subject to subsection 92), may operate a pipeline.

1975(2) c30 s19;1985 c46 s19

20. (1) The Board may grant a licence to an applicant subject to any terms and conditions expressed in the licence, or the Board may refuse to grant a licence.

1975(2) c30 s20;1983 c27 s7(1);1985 c46 s20

Commentary

The Act provides that a person/company wishing to construct a pipeline must first obtain a permit to construct which the Board may issue pursuant to section 11 on any terms and conditions it considers appropriate and within their jurisdiction to impose. Likewise, section 19 of the Act prohibits anyone from operating a pipeline without a licence to operate which the Board may issue pursuant to section 20 (which may also have terms and conditions attached).

The "permittee" or "licensee" of the pipeline is the party responsible for the workings and undertakings given, including abandonment, in respect of the pipeline under the *Pipeline Act*. Although several parties may have some ownership interest in a pipeline, the permittee/licensee is normally (also) an/the owner. However, ownership is not required and there are instances where the licensee has no ownership interest especially in older pipelines.

Because industry practice revealed that the pipeline permittees normally become pipeline licensees within a short time after the permit to construct was issued, and two separate applications to the Board appeared unnecessary and redundant, the Energy Resources Conservation Board (predecessor to the EUB) issued Interim Directive ("ID") 94-6 to consolidate the permit to construct and licence to operate. The key features of the revised permit/licence procedures as provided for in ID 94-6 are as follows:

- Applicants will receive a combined permit/licence which grants permission to construct, commission, and operate. The licence does not take effect until the permit expiry date indicated on the permit/licence, 6 months after the permit approval date.
- Computerized records kept by the Board indicating pipeline status will automatically change from permitting status to operating status 6 months after the permit approval date unless a permit amendment application or time extension request has been filed by the applicant before that time. The onus is therefore on the applicant to update its pipeline status with the Board. The Board will charge a $550 ($1100 for pipelines in excess of 5 kilometres) processing fee for record change

requests after the permit has expired.

PIPELINE ACT

SECTIONS 32 and 33

32. A licensee shall not

(a) suspend the normal operation of a pipeline, except in an emergency or for repairs or maintenance or in the ordinary course of operating the pipeline,

(b) discontinue the operation of a pipeline, or

(c) resume the operation of a pipeline previously discontinued,

without the consent in writing of the Board or in accordance with an order of the Board.

1975(2)c30 s32

33. (1) Except in the ordinary course of making repairs or of maintenance, no pipeline or part of a pipeline may be taken up, removed or abandoned without the consent of the Board and the consent of the Board may be given subject to any terms and conditions the Board prescribes.

(2) The Board may cancel the licence or amend the licence because of the taking up, removal or abandonment of the pipeline or any part of the pipeline.

1975(2) c30 s33

Commentary

The Board must be notified and their consent obtained before operations on a pipeline are discontinued or the pipeline is taken up, removed or abandoned. "Abandonment" is defined in section 1(2)(a) of the Regulation as "the permanent deactivation of a pipeline or part of a pipeline, whether or not it is removed". This definition may be contrasted with that of "discontinue" in the Regulation, section 1(2)(f), which means "the temporary deactivation of a pipeline or part of a pipeline where the licence remains in effect. The term "discontinue" is used interchangeably with the term "suspend" in the Act and the Regulation, and the two words have the same meaning.

The general information requirements for a discontinuance application are set out in section 60 of the Pipeline Regulation, which reads:

60. An application to the Board for consent to discontinue the operation of a pipeline or any part of a pipeline shall include

(a) 1 copy of the application form as set out in Schedule 3,

(b) 2 copies of the most recent Board Pipeline Base Map showing the pipeline or part of the pipeline proposed for discontinuance, coloured in green, and

(c) a statement concerning

(i) the reason for discontinuance, and

(ii) the proposed method for discontinuing operations.

(AR 316/87)

Further provisions of the regulations which relate to discontinuance of pipeline operations include the following:

61. On receipt by the applicant of the Board's consent to discontinue a pipeline or any part of a pipeline, the discontinued line or part of a pipeline shall be physically isolated or disconnected from any operating facility and left in a safe condition.

62. Corrosion control measures shall be maintained on a discontinued pipeline.

63. The Board shall be advised when work required for the discontinuation of the pipeline or any part of the pipeline has been completed.

The information which must be included in an application to the Board for consent for removal or abandonment of a pipeline is set out in section 66 of the Regulation, which reads:

66. An application to the Board for consent for removal or abandonment of a pipeline shall include

(a) 1 copy of the application form as set out in Schedule 3,

(b) 2 copies of the most recent Board Pipeline Base Map showing the pipeline or part of the pipeline which is to be removed or abandoned, coloured in green, and

(c) a statement regarding

(i) the reason for removal or abandonment,

(ii) the method to be used for the removal or abandonment,

(iii)ownership of the pipeline after abandonment if it is to be abandoned, and

(iv) the notification of landowners and occupants affected by the proposed removal or abandonment.

(AR 316/87)

Amongst the information required in the removal or abandonment application is notification to landowners and occupants affected by the proposed removal or abandonment. If a landowner or occupant objects to removal or abandonment or is concerned about ownership or liability for the pipeline after it has been abandoned in place, that person may raise these concerns with the Board at this time. Pursuant to section 31 of the Act, the Board may then give its consent to abandon subject to certain terms and conditions which will address the landowners'/occupants' concerns.

Section 66 of the Regulation also requires that the applicant furnish information to the Board concerning ownership of the abandoned pipeline. This requirement enables the Board to keep its records updated in the event it becomes necessary to track down the owner in the future, for liability for damage or any other reasons. In this regard, section 69 of the Regulation is important to note, because it provides that the licensee continues to be responsible for any additional work which may be required on the pipeline, in perpetuity. It reads:

69. The Board's consent for an abandonment operation does not relieve the licensee or its assignee from the responsibility of further abandonment or other operations that may from time to time become necessary.

(AR 148/92)

Accordingly, although the Board has the power under section 33(2) of the Act to cancel a licence due to removal or abandonment of a pipeline, it has never done so because of section 69 of the Regulation. Once a licensee, always a licensee.

Specific requirements for abandonment and provision for notification to the Board of completion are also set out in the Regulation in section 67, which reads:

67. (1) On receipt by the applicant of Board consent to the abandonment of a pipeline or part of a pipeline, the pipeline or part of the pipeline to be abandoned shall be

(a) physically isolated or disconnected from any operating facility,

(b) cleaned if necessary and purged with fresh water, air or inert gas and left in a safe condition, and

(c) plugged or capped at all open ends.

(2) If a pipeline or part of a pipeline is removed or abandoned, the licensee shall advise the Board when all work is required to remove or abandon the pipeline or part of the pipeline has been completed.

(AR 148/92)

Other Post-Abandonment Considerations

Section 34 of the Act illustrates how far-reaching the Board's powers are over pipeline licensees. Even after a pipeline has been abandoned in place, the Board may direct the licensee to, *inter alia*, alter or relocate any part of the pipeline, and allocate costs of that work to be apportioned as the Board sees fit. That section reads:

34. (1) When in its opinion it would be in the public interest to do so, the Board may, on any terms and conditions it considers proper, direct a permittee or licensee

(a) to alter or relocate any part of his pipeline,

(b) to install additional or other equipment on his pipeline, or

(c) to erect permanent fencing on the right of way or provide any other protective measures within the controlled area that the Board considers necessary.

(2) Where the Baord directs the alteration or relocation of a pipeline, the installation of additional or other equipment on a pipeline, the erection of fences or the provision of other protective measures within the controlled area, it may order by whom and to whom payment of the cost of the work and material, or either, shall be made.

(3) If a dispute arises as to the amount to be paid pursuant to an order under subsection (2), it shall be referred to the Board and the Board's decision is final.

RSA 1980 cP-8 s34; 1981 c30 s9

Crossing Agreements

Third parties wishing to cross pipelines (i.e. cause a ground disturbance near a pipeline) must normally obtain a crossing agreement from the pipeline licensee to do so, pursuant to the requirements set out in section 31.1 of the Act and sections 21 and 22 of the Regulation. No exception is made for abandoned pipelines in these provisions. However, in practice, crossing agreements are not normally obtained in respect of abandoned lines, especially if the licensee is defunct or cannot be located. In those instances, third parties who wish to create a ground disturbance where a pipeline is in place should seek guidance from EUB staff as to what precautions must be taken. The EUB's practice has been to issue a letter of permission to cross the pipeline in instances where the licensee is not available to give permission.

Signage Requirements

Section 23 of the Regulation sets out the requirements for pipeline warning signs, for example to be erected where a pipeline crosses a highway, road, railway or watercourse. These requirements continue after a pipeline has been abandoned in place, and so must be continuously maintained by the licensee despite abandonment.

PIPELINE ACT

SECTION 37

37. (1) When a substance escapes from a pipeline and it appears to the Board that the substance may not otherwise be contained and cleaned up forthwith, the Board may

(a) direct the pipeline operator or licensee, or those pipeline operators or licensees who in the opinion of the Board could be responsible for a pipeline from which the substance escaped, to take any steps that the Board considers necessary to contain and clean up, to the satisfaction of the Board and the Department of Environmental Protection, the substance that has escaped and to prevent further escape of the substance, or

(b) enter on the area where the substance has escaped and conduct any operations it considers necessary to contain and clean up the substance that has escaped and to prevent further escape of the substance.

(2) When the Board enters on an area pursuant to subsection (1)(b),

(a) every person responsible for the escape of the substance, every pipeline operator or licensee who in the opinion of the Board could be responsible for a pipeline from which the substance escaped and every officer and employee of that person, operator or licensee shall, until the operations to be conducted by the Board are completed, obey the orders concerning those operations given by the Board or a person or persons . e Board places in charge of those operations;

(b) the Board may recover, deal with and dispose of the escaped substance as if it were the property of the Board, and if any such substance is sold, apply the proceeds to pay the costs and expenses of the operations conducted by the Board;

(c) the Board may engage any persons it considers necessary to conduct any of the operations on its behalf.

(3) When any operations are conducted pursuant to this section

(a) by an operator, licensee or other person under subsection (1)(a) and the operator, licensee or person requests the Board to do so, or

(b) by or on behalf of the Board under subsection (1)(b),

the Board may determine the costs and expenses of the operations and direct by whom and to what extent they are to be paid.

(4) No action or proceeding may be brought against a person named in a direction issued pursuant to subsection (1)(a) in respect of any act or thing done pursuant to the direction

RSA 1980 cP-8 s37;1994 cG-8.5 s85

Commentary

When harmful substances escape from a pipeline, whether or not the pipeline is in a pre- or post-abandonment stage, the EUB has the specific authority under section 37 to order that the substance be cleaned up forthwith by the "operators or licensees who in the opinion of the Board could be responsible for a pipeline from which the substance escaped". Alternatively, the Board may enter onto the site and clean up the substance itself and collect the costs by way of civil enforcement from the parties responsible for the pipeline.

Pursuant to subsection (1)(a), any clean up of an escaped substance must be performed to a standard which satisfies both the EUB and the Alberta Department of Environmental Protection ("AEP"). As the title implies, AEP has jurisdiction over all matters of the environment and the EUB works closely with AEP to ensure that provincial environmental standards are complied with by the energy industry sector it regulates.

To illustrate further how the EUB and AEP cooperate in pipeline matters: in the initial stages of a pipeline, applications for a permit to construct/licence to operate, once received by the EUB, must be referred to the Minister of Environmental Protection and the Minister responsible for the *Public Lands Act* for their approval of the application as it affects matters of the environment (section 8 of the *Pipeline Act*). AEP's jurisdiction is also triggered when undertaking construction and abandonment of pipelines because that

Department regulates conservation and reclamation activities pursuant to the *Environmental Protection and Enhancement Act* ("EPEA") and its regulations, which are discussed in more detail elsewhere in this report.

In September of 1994, the EUB (then the ERCB) issued Informational Letter ("IL") 94-17 which advises industry participants to notify conservation and reclamation inspectors of AEP of pipeline projects early in the planning stages of the pipeline project. The EUB considers AEP, as the administrator of EPEA, to be a directly affected party in any pipeline application to the EUB. Therefore, an applicant is required to discuss conservation and reclamation procedures with the regional Conservation and Reclamation Inspector to avoid delay in the initial approval of the pipeline application.

PIPELINE ACT

SECTIONS 51 and 52

51. (2) A person who

> *(a) whether as a principal or otherwise, contravenes any provision of this Act or of the regulations or of any order, direction, permit or licence under this Act,*
>
> *(b) either alone or in conjunction or participation with others causes any holder of a permit or licence to contravene any of those provisions, or*
>
> *(c) instructs, orders, directs or causes any officer, agent or employee of any holder of an approval, permit or licence to contravene any of those provisions,*

is guilty of an offence.

1975(2) c30 s51

52. A prosecution for an offence under this Act may be commenced within 18 months from the time when the subject matter of the proceedings arose, but not afterwards.

1975(2) c30 S52

Commentary

The above sections provide a penal remedy to the EUB should a party disobey an abandonment or clean up order, or otherwise contravene any other provision of the Act or regulations. Therefore, in addition to civil liability for certain clean up costs, a responsible party could incur criminal liability under the Act. The fines for committing an offence under the Act are set out in section 53, which reads:

53. (1) Subject to subsection (2), a person who is guilty of an offence under this Act is liable,

> *(a) if a corporation, to a fine not more than $10 000, or*
>
> *(b) if an individual, to a fine of more than $ 5 000.*

(2) A person who is found guilty of an offence under this Act that is a continuing offence is liable

(a) if a corporation, to a fine of nor more than $10 000 for the first day on which the offence occurs and not more than $5 000 for each subsequent day during which the offence continues, or

(b) if an individual, to a fine of not more than $5 000 for the first day on which the offence occurs and not more than $2 500 for each subsequent day during which the offence continues.

(3) A person other than a corporation who defaults in payment of a fine imposed for a continuing offence is liable to imprisonment for a term not exceeding 6 months.

1975(2) c30 s53; 1981 c30 s12

ENERGY RESOURCES CONSERVATION ACT

SECTIONS 1 and 2

1. In this Act,

(d) "environment"means the components of the earth and includes

(i) air, land and water,

(ii) all layers of the atmosphere,

(iii) all organic and inorganic matter and living organisms, and

(iv) the interacting natural systems that include components referred to in subclauses (i) to (iii).

RSA 1980 cE-11 s1;1992 cE-13.3 s246(5)

2. The purposes of this Act are

(d) to control pollution and ensure environment conservation in the exploration for, processing, development and transportation of energy resources and energy;

1971 c30 s2

Commentary

The statute which created the ERCB and which outlines many of the Board's powers and the scope of its jurisdiction is the *Energy Resources Conservation Act*, R.S.A. 1980, c. E-11 ("ERCA"). The EUB inherited that jurisdiction pursuant to the *Alberta Energy and Utilities Board Act*, S.A. 1995, c. A-19.5. The above sections of the ERCA give a mandate of conserving the environment (which word is defined very broadly) to the EUB "in the exploration for, processing, development and transportation of energy resources and energy". This phrase includes pipeline projects. The *Pipeline Act* does not contain any specific provisions or requirements that a pipeline be abandoned after a certain length of suspension, nor upon direction from

the Board. However, the EUB has in the past, pursuant to its mandate and jurisdiction as set out in section 2 of the ERCA, ordered pipelines abandoned under section 21 of this same Act, which section provides:

21. The Board, with the approval of the Lieutenant Governor in council, may take any action and may make any orders and directions that the Board considers necessary to effect the purposes of this Act and that are not otherwise specifically authorized by this Act.

RSA 1980 cE-11 s21

ORPHAN FACILITIES, PIPELINES AND RECLAMATION SUBCOMMITTEE

In December of 1991, an Orphan Well Program Administration Subcommittee and a Well Transfer Criteria Subcommittee (now known as the Fund Advisory Committee) met to outline a formal procedure for dealing with orphan wells. In 1994, the Orphan Facilities, Pipelines and Reclamation Subcommittee ("Subcommittee") was created to incorporate orphan facilities, pipelines and reclamation into the procedure. [As it is used in this section, the word "reclamation" includes abandonment, decontamination and land reclamation concerning a well or facility.]

As directed by Fund Advisory Committee ("FAC"), the Subcommittee has developed a formal procedure known as the Orphan Program ("OP") through which the abandonment of orphan wells has been extended to include abandonment, decommissioning and land reclamation of certain oil and gas production and processing facilities and their associated pipelines. The goals and objectives of the OP will be accomplished through a co-ordinated effort involving the EUB, AEP, Alberta Agriculture, Food and Rural Development, a Program Superintendent, a technical advisory Working Group and the FAC. The costs associated with this program will primarily be funded by an annual levy paid by industry on inactive wells and abandoned but uncertified wells, and multi-well facilities. (An uncertified well or facility is its state or status prior to the site being certified as acceptably reclaimed.) The annual levy collected from industry is put into an abandonment fund ("Fund") which finances the activities of the OP.

The objective of the OP is to minimize the risk of wells, facilities and pipelines being added to Alberta's current list of orphans, and to design and conduct a program to abandon existing orphans on an acceptable schedule. The Fund is intended to be used as a last resort, and industry participants involved with facilities in question will be called upon to fulfil their regulatory duties and obligations before any resort to the Fund is made. Finally, although the detailed recommendations of the Subcommittee have not yet received formal approval from the regulators, the regulators are committed to the outcomes.

The OP is intended only to apply to pipelines upstream of a producer's custody transfer point to a transporter or carrier, and does not include oil transmission pipelines and associated storage, pumping and measurement facilities, and gas transmission pipelines and associated compression and measurement facilities. The OP will not cover large diameter pipelines, which may be the pipelines that cause the most concern when abandoned.

The Subcommittee is of the view that the pipeline licensee has primary legal responsibility for the construction, operation and reclamation of a pipeline. If the pipeline licensee is defunct, a secondary reclamation responsibility for pipelines servicing a well lies with the well licensee/working interest owner ("WIO") if no other party assumes responsibility through transfer of the pipeline license. In these cases, the licensee /WIO of the well is responsible for reclamation of the pipeline from the well to the first point where the pipeline joins a group line. Secondary reclamation responsibility for pipelines into a multi-well facility lies with the multi-well facility licensee/WIO, if the pipeline licensee is defunct and if no other

party assumes responsibility through transfer of the pipeline license. In such cases, the multi-well facility licensee/WIO is responsible for the reclamation of all pipelines feeding into the multi-well facility from the point where the well licensee/WIO's responsibility ceases. Before tapping into the Fund to cover abandonment costs for pipelines included in the OP, the administrators of the OP will first look to the above-noted parties.

The Subcommittee has also recommended that certain additional requirements be incorporated into the legislation administered by the EUB and AEP to further encourage operators to reclaim wells, multi-well facilities and infrastructure as soon as practical. The following requirements have been recommended by the Subcommittee and will likely be adopted by the regulators:

- Facilities and infrastructure must safely be suspended within six months of becoming inactive.
- Abandoning of facilities must be completed within 18 months of becoming inactive.
- Decontamination and land reclamation must be completed within three years of the facility becoming inactive, or land reclamation must be in progress according to a plan that provides details of the reclamation program and the reasons for not being able to complete the work within this specified period.
- Where abandonment has not occurred within 18 months, or where decontamination and land reclamation are not completed within three years, the EUB should require a refundable deposit to be calculated using the formula of $50,000 x Well Equivalency based on facility size as set out in the Subcommittee report, subsection 3.2.6.

SURFACE RIGHTS ACT

SECTIONS 12 AND 31

12. (1) No operator has a right of entry in respect of the surface of any land

(a) for the removal of minerals contained in or underlying the surface of that land or for or incidental to any mining or drilling operations,

(b) for the construction of tanks, stations and structures for or in connection with a mining or drilling operation, or the production of minerals, or for or incidental to the operation of those tanks, stations and structures,

(c) for or incidental to the construction, operation or removal of a pipeline,

(d) for or incidental to the construction, operation or removal of a power transmission line, or

(e) for or incidental to the construction, operation or removal of a telephone line,

until the operator has obtained the consent of the owner and the occupant of the surface of the land or has become entitled to right of entry by reason of an order of the Board pursuant to this Act.

1983cS-27.1 s12;1987 c2 s8

Commentary

The Surface Rights Board ("SRB") regulates surface rights to all land in Alberta, except land within the

geographical area of a Metis settlement, pursuant to the *Surface Rights Act* ("SRA"). Parties wishing to construct and operate a pipeline will require a right of entry (defined as "the right of entry, user and taking of the surface of the land" in section 1(m) of the SRA) in respect of the land the pipeline will occupy. Consent for the right of entry must be obtained from the owner and occupant of the land (both terms are defined in section 1 of the SRA), or from the SRB by way of a right of entry order.

The term "operator" is defined in section 1(h) of the SRA as follows:

> *(h) "operator" means*
>
> > *(ii) with reference to a pipeline, power transmission line or telephone line, the person empowered to acquire an interest in land for the purpose of the pipeline, power transmission line or telephone line under the Pipeline Act, the Hydro and Electric Energy Act or the Water, Gas and Electric Companies Act, as the case may be.*

The definition of "operator" in the SRA cross-references the permitee/licensee in the *Pipeline Act* as the party able to obtain a right of entry order.

Section 31 of the SRA provides that a right of entry order granted by the Board will continue in effect until such time as the land is reclaimed and a reclamation certificate is granted under the *Environmental Protection and Enhancement Act*.

31. (4) The Board shall not terminate the right of entry order as to the land or any part of it until a reclamation certificate has been issued for that land in any case to which Part 5 of the Environmental Protection and Enhancement Act applies.

(5) When a reclamation certificate has been issued under Part 5 of the Environmental Protection and Enhancement Act as to the land or any part of it held under the right of entry order, the Board may, without any inquiry, make an order terminating the right of entry order entirely or as to the part of the land to which the reclamation certificate relates, as the case may be.

1983 c2-27.1 s31;1992 cE-13.l3 s246(14)

SURFACE RIGHTS ACT

SECTION 33

33. (1) Subject to subsections (2) to (4), the Board may hold a hearing and make an order with respect to a dispute between the operator and an owner or occupant who are parties to a surface lease or the operator and an owner or occupant under a right of entry order as to the amount of compensation payable by the operator

> *(a) for damage caused by or arising out of the operations of the operator to any land of the owner or occupant other than the area granted to the operator,*
>
> *(b) for any loss or damage to livestock or other personal property of the owner or occupant arising out of the operations of the operator whether or not the land on which the loss or damage occurred is subject to the surface lease or right of entry order, or*

(c) for time spent or expense incurred by an owner or occupant in recovering any of his livestock that have strayed due to an act or omission of the operator whether or not the act or omission occurred on the land that is subject to the surface lease or right of entry order.

(2) The Board has jurisdiction to hear and determine a dispute under this section only if

(a) the application is made in writing to the Board by a party to the dispute within 2 years of the last date on which damage is alleged to have occurred, and

(b) the amount of compensation claimed by the owner or occupant does not exceed $5000.

(3) This section does not apply to a claim for compensation the amount of which may be determined by the Board under section 25.

(4) An order under this section may be appealed by the operator or the owner or occupant as though the order were a compensation order under section 23.

1983 cS-27.1 s33;1987 c2 s8

Commentary

In section 33, the SRA provides for a dispute resolution mechanism which an owner or occupant may engage where they suffer damage to livestock or property as a result of the operations of the operator where there is a right of entry order or easement in affect in respect of a pipeline. The provision furnishes aggrieved owners and occupants with a useful remedy where their damage claim does not exceed $5000. As long as the right of entry agreement or order is in effect, the operator will continue to be liable in respect of damage claims by owners and occupants under the SRA. Any claims exceeding $5000 are outside the scope of the SRA.

Appendix 2B

ENVIRONMENTAL PROTECTION AND ENHANCEMENT ACT AND REGULATIONS

PIPELINE ABANDONMENT PROVISIONS

Introduction

Alberta's Department of Environmental Protection ("AEP") administers the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 ("EPEA") with a mandate to support and promote the protection, enhancement and wise use of the environment. Included in this task is regulation of environmental matters concerning pipeline construction, operation and reclamation. While suspension and abandonment of pipelines is regulated by the EUB, AEP is the governing body in respect of reclamation of the land

servicing the pipeline once abandonment has taken place and conservation of that land during construction and operation of the pipeline.

A Conservation and Reclamation Approval ("C & R Approval") is required to address reclamation for Class I pipelines following construction. The requirements flow from the Activities Designation Regulation. The final obligation to reclaim the land following abandonment flows from section 122 of the act which requires an operator to reclaim specified land.

The construction, operation and reclamation of a pipeline is designated by the Activities Designation Regulation (AR 110/93, as amended) as an activity for which an approval is required under EPEA (see section 2 of the Regulation and its Schedule, Division 3(c)). That approval is catagorized as a C & R Approval by AEP. The definition of "pipeline" in the Act and regulations exempts certain types of pipelines (Class II pipelines) from requiring a C & R Approval. All other pipelines (Class I pipelines) will require a C & R Approval before they are constructed, however, and the Director may issue that approval subject to any terms and conditions deemed appropriate under section 65 of EPEA. The definitions of "pipeline" are set out below:

EPEA

1 In this Act

(vv) "pipeline" means

(i) a pipe for the transmission of any substance and installations in connection with that pipe,

Activities Designation Regulation, AR 211/96

2(3) The following definitions apply for the purposes of Division 3 Schedule 1:

(h) "pipeline" means a pipeline as defined in the Act and any infrastructure in connection with that pipeline but does not include the following:

(i) a pipeline or part of a pipeline located in a city, town, specialized municipality, village or summer village;

(ii) a pipeline or part of a pipeline located in a plant site at which an activity that requires an approval under this Regulation is carried on;

(iii)a pipeline with a length in kilometres times diameter in millimetres resulting in an index number of less than 2690;

(iv) a pipeline regulated pursuant to the National Energy Board Act (Canada);

(v) a pipeline that is a rural gas utility as defined in the Rural Gas Act;

(vi) a pipeline that is part of a waterworks system, wastewater system or storm drainage system that has a length in kilometres times diameter in millimetres resulting in an index number of less than

2690;

(vii)a pipeline or telecommunication line that is ploughed in;

(viii)a pipeline that is used solely for the purposes of an agricultural operation and is located wholly on land that is used for the purposes of an agricultural operation;

(ix) a pipeline that is abandoned in the ground;

Class II pipelines include those pipelines listed in section 2(3)(h) of the Regulation above. Although these pipelines do not require a C & R Approval under EPEA, they are subject to the Act's environmental enforcement provisions and must eventually obtain a reclamation certificate. (However, when "eventually" is for a pipeline which is abandoned in place is not clear.) The only pipeline projects which are exempt from requiring a reclamation certificate on or in respect of specified land are listed in section 15.1 of the Conservation and Reclamation Regulation as:

(i) a pipeline that is a rural gas utility as defined in the Rural Gas Act,

(ii) a pipeline that is less than 15cm in diameter and is ploughed into the ground,...

The Environmental Protection Guidelines published by AEP's Land Reclamation Division provide the necessary guidance to operators of Class II pipelines to achieve conservation and reclamation objectives. Class II pipelines which occupy public lands also require a surface disposition (pipeline agreement or easement) from the Land Administration Division of AEP. Conservation and reclamation guidelines for Class I pipelines will normally be outlined in their C & R Approval.

EPEA

1 In this Act

(ccc)"reclamation" means any or all of the following:

(i) the removal of equipment or buildings or other structures or appurtenances;

(ii) [Repealed 1996, c. 17, s. 2(e)];

(iii)the decontamination of buildings or other structures or other appurtenances, or land or water;

(iv) the stabilization, contouring, maintenance, conditioning or reconstruction of the surface of land;

(v) any other procedure, operation or requirement specified in the regulations;

1994 c15 s2;cM-26.1 s642(22);cR-9.07 s25(11);1996 c17 s2;c30 s69(2)

Commentary

The objective of conservation and reclamation is to return disturbed land to an equivalent land capability, which means that the ability of the land to support various lands uses after conservation and reclamation is similar to the ability that existed prior to that activity being conducted on the land (Conservation and Reclamation Regulation, AR 115/93, as amended, section 1(e)). In the case of linear disturbances such as pipelines, where the landscape is not changed, the focus of capability is on the soil and vegetation. The Guide for Pipelines (published by AEP's Land Reclamation Division) lists what the concept of "conservation" includes:

1. minimizing the extent of disturbance, regardless of the ability to reclaim the land;
2. minimizing or mitigating the effects of development on land and soil resources;
3. salvaging soil resources for use in reclamation; and
4. controlling wind and water erosion.

Likewise, the Guide lists what is included in the concept of "reclamation" as all practical and desirable methods for:

1. designing and conducting an operation to enhance the potential for disturbed land to be reclaimed to equivalent land capability;
2. handling material to ensure reconstructed soils have an equivalent soil capability relative to the soils that existed prior to disturbance;
3. contouring the land surface to meet the land capability objective, as well as to ensure stability, to protect the surface against wind or water erosion, to provide for surface drainage, and to minimize hazards;
4. revegetating and managing the land to meet the land capability objective; and
5. re-establishing surface water resources to meet the land capability objective.

EPEA

122 (1) An operator must

(a) conserve and reclaim specified land, and

(b) unless exempted by the regulations, obtain a reclamation certificate in respect of the conservation and reclamation.

(2) Where this Act requires that specified land must be conserved and reclaimed, the conservation and reclamation must be carried out in accordance with

(a) the terms and conditions in any applicable approval,

(b) the terms and conditions of any environmental protection order regarding conservation and reclamation that is issued under this Part,

(c) the directions of an inspector or the Director, and

(d) this Act.

1994 c15 s43

119 In this part

(b)"operator" means

(i) an approval or registration holder who carries on or has carried on an activity on or in respect of specified land pursuant to an approval or registration.

(ii) any person who carries on or has carried on an activity on or in respect of specified land other than pursuant to an approval or registration.

(ii.2) the holder of a licence, approval or permit issued by the Energy Resources Conservation Board for purposes related to the carrying on of an activity on or in respect of specified land,

(ii.2) the holder of a surface lease for purposes related to the carrying on of an activity on or in respect of specified land,

(iii) a successor, assignee, execu or, administrator, receiver, receiver-manager or trustee of a person referred to in any of subclauses (i) to (ii.2), and

(iv) a person who acts as principal or agent of a person referred to in any of subclauses (i) to (iii);

1994 c15 s42;1996 c17 s32

Conservation and Reclamation Regulation, AR 167/96

1 In this Regulation, and, in the case of clause (t), for the purposes of Part 5 of the Act,

(t) "specified land" means land that is being or has been used or held for or in connection with

(ii) the construction, operation or reclamation of a pipeline, telecommunication system or transmission line;

Note: This definition repeals s. 1(w) of Alta. Reg. 115/93 and 245/93, which included:

(viii) the construction, operation or reclamation of an extra provincial undertaking;

Commentary

Section 122 of EPEA sets out the duty of an operator to conserve and reclaim specified land. The land upon which a pipeline is constructed and operated falls within the definition of "specified land" in the regulations. The definition of "operator" in the Act includes persons undertaking an activity with or without

an approval, so both Class I & II pipeline operators are included. Also, an "operator" includes, *inter alia*, a receiver, receiver-manager or trustee of the party which is licensed to operate the pipeline. Therefore, bankruptcy will not eliminate the obligation to conserve and reclaim the land which a pipeline occupies.

It is questionable whether the obligation to reclaim specified land would apply to land used for an NEB regulated pipeline. Principles of statutory interpretation would suggest that the repeal of the subsection referring to extra provincial undertakings may mean that the definition of specified land no longer applies to NEB regulated pipelines.

As noted in section 122(2)(b), an environmental protection order is one enforcement mechanism available to conservation and reclamation inspectors to ensure that conservation and reclamation of specified land is carried out. The powers to issue environmental protection orders in respect of conservation and reclamation are set out in sections 125 to 128 of EPEA and section 9 of the Conservation and Reclamation Regulation. An environmental protection order can issue at any time prior to a reclamation certificate being obtained in respect of a pipeline, but not after (section 15(1)(b) of the Conservation and Reclamation Regulation).

EPEA provides for a number of other enforcement mechanisms which may be resorted to where pipeline activity causes environmental damage. They include, *inter alia*:

- statutory prohibition of release of substances, outlined in Part 4 of EPEA;
- power to issue enforcement orders (an order not unlike an environmental protection order, but often more severe in nature) under section 200 of the Act;
- creation of a civil cause of action for offences committed under the Act, outlined in section 207;
- injunctions to prohibit the commission of an offence under the Act or from causing someone to suffer loss or damage as a result of an activity, set out in sections 209 and 211 of the Act;
- liability of directors and officers for participating in an offence committed by their corporation, provided for in section 218; and
- administrative penalties may be issued (much like a fine) in respect of a contravention of the Act (section 223).

EPEA

123 (1) An application for a reclamation certificate must be made by the operator to the Director in the form and manner provided for in the regulations.

(2) An inspector may issue a reclamation certificate to the operator if the inspector is satisfied that the conservation and reclamation have been completed in accordance with section 122(2).

(3) An inspector may issue a reclamation certificate with respect to all or only a part of the specified land, and in the latter case section 122 continues to apply with respect to the remaining specified land.

(3.2) An inspector may issue a reclamation certificate subject to any terms and conditions the inspector considers appropriate.

(4) An approval in respect of an activity on specified land expires on the date that the final reclamation certificate is issued under this Part unless the approval specifies a different expiry date.

1994 c15 s44

Commentary

Section 123 of EPEA gives the conservation and reclamation inspector authority to issue a reclamation certificate if he/she is satisfied that conservation and reclamation have been completed. The information required to be furnished in a reclamation certificate application is set out in section 12 of the Conservation and Reclamation Regulation. The C & R Approval which is in place in respect of the pipeline project expires on the date the final reclamation certificate is issued, unless otherwise specified in the Approval itself.

Appendix 3A

NATIONAL ENERGY BOARD

PIPELINE ABANDONMENT PROVISIONS

NATIONAL ENERGY BOARD ACT

SECTION 19. (1)

19. (1) Without limiting the generality of any provision of this Act that authorizes the Board to impose terms and conditions in respect of a certificate, licence or order issued by the Board, the Board may direct in any certificate, licence or order that it or any portion or provision thereof shall come into force at a future time or on the happening of any contingency, event or condition specified in the certificate, licence or order or on the performance to the satisfaction of the Board of any conditions that the Board may impose in the certificate, licence or order, and the Board may direct that the whole or any portion of the certificate, licence or order shall have force for a limited time or until the happening of a specified event.
insert subsection 19(1)

Commentary

This subsection is one of the general powers of the Board. It states that the Board may make an order which will not go into effect unless and until "the happening of any contingency, event or condition specified in the certificate, licence or order or on the performance to the satisfaction of the Board of any conditions that the Board may impose in the certificate, licence or order...". This provision is useful to the Board because it allows the Board to implement certain mitigation measures associated with an abandonment prior to the effective date of the abandonment.

This subsection of the NEBA is very similar to a provision in the former *National Transportation Act* R.S.C. 1970, c. N-17, which governed proceedings conducted before the Canadian Transport Commission. In one CTC case, *Re Canadian National Railway Company (Trent River Bridge)*, [1987] C.T.C.R. 3 (CTC Review Committee) the CTC allowed an abandonment but provided in its order that the abandonment order would not come into force until the railway company had removed a bridge over a river for safety reasons. The CTC panel relied on the equivalent of section 19(1) of the NEBA in making its conditional abandonment decision. A review of that order was conducted by the CTC Review Committee which upheld the right of the Commission to delay the coming into force of an order until the bridge had been removed.

NATIONAL ENERGY BOARD ACT

SECTION 24. (1)

24. (1) Subject to subsection (2), hearings before the Board with respect to the issuance, revocation or suspension of certificates or of licences for the exportation of gas or electricity or the importation of gas or for leave to abandon the operation of a pipeline shall be public.

Commentary

This provision requires that any hearing held by the Board with respect to the abandonment of a pipeline must be a public hearing.

NATIONAL ENERGY BOARD ACT

SECTION 73. (b), (g)

73. A company may, for the purposes of its undertaking, subject to this Act and to any Special Act applicable to it,

> *(b) purchase, take and hold of and from any person any land or other property necessary for the construction, maintenance and operation of its pipeline and alienate, sell or dispose of any of its land or property that for any reason has become unnecessary for the purpose of the pipeline;*
>
> *(g) alter, repair or discontinue the works mentioned in this section, or any of them, and substitute others in their stead;*

Commentary

These provisions provide a pipeline company with corporate authority to purchase lands that are required for pipeline purposes, or to dispose of lands which are no longer required for pipeline purposes. The importance of these provisions appear to be that subsequent to the authorization of an abandonment, a pipeline company appears to be able to exercise its corporate powers and separate lands no longer required in respect of the pipeline from the remaining pipeline lands. The effect of such a separation appears to be the removal of the surplus lands from the jurisdiction of the NEB.

The issue of whether lands are surplus to the statutory purposes of a railway work and undertaking have been examined in a number of court and tribunal cases. The judgment of the House of Lords (Scotland) in the early case of *MacFie v Callander and Oban Railway Company*, [1898] A.C. 270 (H.L.Sc.), as summarized in the headnote of the case, was "that whether the land had become superfluous or not was a question of mixed law and fact". In that case it was deemed to be a discretionary power of the Board of Directors of the company to determine if the lands had become surplus to the requirements of the railway company.

Although not specifically relying on the *Macfie* case, the Board of Railway Commissioners for Canada appears to have adopted the reasoning of the *Macfie* case in *Cairns Bros. v CNR*, [1937] 2 D.L.R. 537 (BRC) in which the BRC was asked to order the CNR to provide fencing along an abandoned right-of-way.

The decision of the Board stated:

Where abandonment of operation has been authorized and has taken place, the right of way through which the railway is operated ceases to be used for railway purposes and is held by the company, not as part of its *railway* qua railway company, but in the same way as land is held by private individuals, subject to any provincial or municipal laws in respect of fencing which may be in force in the particular district.

The same issue arose again in the case of *Canadian Pacific Limited v Saskatchewan Heritage Property Review Board*, [1984] 6 W.W.R. 210 (Sask Q.B.). In that case, the CTC had authorized the removal of a station belonging to CP. When the railway moved to demolish the station house, the Provincial agency and the Town of Kerrobert attempted to protect the site under heritage legislation. CP contested the applicability of provincial legislation on the grounds that Provincial law could not apply to lands which were owned by CP and required by it for the conduct of its rail operations. In that instance, the Court, explicitly relying in the *Macfie* case, deferred to the opinion of the railway company stating:

> If it cannot be established that the property of a railway company which may be subject to provincial legislation is but a convenience and not an essential part of the transportation operation, a court should not interfere in a bona fide decision of a railway company that the property is required to maintain the operation of its railway system.

The principle of the *Saskatchewan Heritage Property Review Board* case was applied by the Canadian Transportation Commission in *Re CP Fife Lake Subdivision* (1985, unreported no. WDR 1985-03) in which an application was made to compel a re-opening of an abandoned railway line for the receipt of traffic. The Commission noted in that case that; "Canadian Pacific has not given any indication that the abandoned branch line segment between Coronach and Big Beaver has been declared to be surplus lands which are no longer required for railway purposes".

NATIONAL ENERGY BOARD ACT

SECTION 74

74. (1) A company shall not, without the leave of the Board,

> *(a) sell, convey or lease to any person its pipeline, in whole or in part;*
> *(b) purchase or lease any pipeline from any person;*
> *(c) enter into an agreement for amalgamation with any other company; or*
> *(d) abandon the operation of a pipeline.*

(2) For the purposes of paragraph (1)(b), "pipeline" includes a pipeline as defined in section 2 or any other pipeline, and, for the purposes of paragraph (1)(c), "company" includes a company as defined in section 2 or any other company.

(3) Notwithstanding paragraph (1)(a), leave shall only be required where a company sells, conveys or leases such part or parts of its pipeline as are capable of being operated as a line for the transmission of gas or oil. R.S., c. N-6, s. 63; R.S., c. 27(1st Supp.), s. 19.

Commentary

This provision authorizes the NEB to grant leave to a pipeline company to abandon the operation of a pipeline. The legal effect of an order issued under section 74(d) is to cancel the authority originally

conferred upon a pipeline company by the Board through the issuance of a certificate of public convenience and necessity, or an exemption order made under section 58. Once an abandonment order takes effect, the company has no authority to resume the operation of a line unless it first seeks and obtains another certificate of public convenience and necessity to construct and/or operate the pipeline pursuant to section 52 together with a leave to open order issued pursuant to section 47, or an exemption order issued pursuant to section 58 of the Act.

The NEB appears to have a broad public interest discretion with respect to the exercise of its jurisdiction pursuant to section 74(d) of the NEBA. Parliament has not established any specific criteria for the Board to examine in connection with abandonment applications.

However, in authorizing an abandonment of a pipeline, the NEB has not been given authority by Parliament to impose any conditions on the abandonment. The authority to be exercised under section 74 (d) is purely an affirmative or negative decision.

NATIONAL ENERGY BOARD ACT

SECTION 111

111. Notwithstanding this Act or any other general or Special Act or law to the contrary, where the pipeline of a company or any part of that pipeline has been affixed to any real property in accordance with leave obtained from the appropriate authority as provided in subsection 108(2) or (6) or without leave pursuant to subsection 108(5),

> *(a) the pipeline or that part of it remains subject to the rights of the company and remains the property of the company as fully as it was before being so affixed and does not become part of the real property of any person other than the company unless otherwise agreed by the company in writing and unless notice of the agreement in writing has been filed with the Secretary; and*
>
> *(b) subject to the provisions of this Act, the company may create any lien, mortgage, charge or other security on the pipeline or on that part of it.*

Commentary

Section 111 provides that the pipeline owned by a company does not become a fixture of the real property of the Crown or any person where it crosses the property of the Crown or any person pursuant to a crossing order granted by an appropriate authority under subsections 108(2) or (6) or without leave of an appropriate authority if the work is done in accordance with general plans and specifications adopted by the appropriate authority or under circumstances and conditions prescribed by the NEB in the case of a utility.

The question which arises is whether or not this provision continues to apply subsequent to the effective date of an abandonment order. If the effect of the abandonment order is to cancel the pre-existing statutory authority to construct, operate and maintain a pipeline at the location of the crossing this section may no longer apply. In that case a property law issue arises with respect to a pipeline which is abandoned in place.

NATIONAL ENERGY BOARD ACT

SECTION 114

114. (1) It is hereby declared that nothing in this Act restricts or prohibits any of the following transactions:

(a) the sale under execution of any property of a company; or

(b) the creation of any lien, mortgage, charge or other security on the property of the company, or the sale, pursuant to an order of a court, of any property of the company to endorse or realize on any such lien, mortgage, charge or other security.

(2) It is hereby declared that a transaction mentioned in subsection (1) in respect of any property of a company is subject to the same laws to which it would be subject if the work and undertaking of the company were a local work or undertaking in the province in which that property is situated.

Commentary

Where a pipeline is constructed and operated pursuant to the National Energy Board Act this provision allows for the creation of a lien, mortgage, charge or other security on the property of the company and for the sale of any property of the pipeline company pursuant to those security interests.

The ability of the company's assets to be made the subject of a security interest while it is an extraprovincial work and undertaking as if it were a local work and undertaking, avoids the application of the constitutional principles of interjurisdictional immunity.

This provision may be of use for the purpose of obtaining a security interest in assets that could be used for reclamation purposes, regardless of the constitutional jurisdiction emanating from section 92(10) of the Constitution Act 1867.

CANADIAN ENVIRONMENTAL ASSESSMENT ACT

SECTION 5(1)(b)

5. (1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority

(d) under a provision prescribed pursuant to paragraph 59(f), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.

Commentary

This provision requires an environmental assessment of any project that is named in the Law List Regulations. Section 74(1)(d) of the NEBA is named in Schedule I, Item 8 of the Law List Regulations. Therefore an environmental assessment of a pipeline abandonment is required.

CANADIAN ENVIRONMENTAL ASSESSMENT ACT

SECTION 11

11. (1) Where an environmental assessment of a project is required, the federal authority referred to in section 5 in relation to the project shall ensure that the environmental assessment is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made, and shall be referred to in this Act as the responsible authority in relation to the project.

(2) A responsible authority shall not exercise any power or perform any duty or function referred to in section 5 in relation to a project unless it takes a course of action pursuant to paragraph 20(1)(a) or 37(1)(a).

Commentary

This provision requires that an environmental assessment be performed in relation to a project described in the Law List Regulations before the responsible authority makes an environmental finding in respect of the project. The legal effect is to make the environmental assessment pursuant to the CEAA a condition precedent to the exercise of a regulatory discretion by the Board.

This provision also defines a federal authority captured by section 5 of the CEAA (for example, the NEB) as a "responsible authority".

CANADIAN ENVIRONMENTAL ASSESSMENT ACT

SECTION 15(1)(a) and (3)

15. (1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by

(a) the responsible authority; or

.....

(3) Where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work that is proposed by the proponent or that is, in the opinion of

(a) the responsible authority, or
(b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority,

likely to be carried out in relation to that physical work.

Commentary

This provision empowers the responsible authority to define the scope of the project and the scope of its

environmental assessment but, pursuant to subsection (3), minimum factors for consideration by the responsible authority are stipulated for the purpose of scoping the assessment.

CANADIAN ENVIRONMENTAL ASSESSMENT ACT

SECTION 16

16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

(a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;

(b) the significance of the effects referred to in paragraph (a);

(c) comments from the public that are received in accordance with this Act and the regulations;

(d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and

(e) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered.

Commentary

This provision establishes the minimum criteria that a responsible authority must examine as part of an environmental screening.

CANADIAN ENVIRONMENTAL ASSESSMENT ACT

SECTION 18

18. (1) Where a project is not described in the comprehensive study list or the exclusion list, the responsible authority shall ensure that

(a) a screening of the project is conducted; and

(b) a screening report is prepared.

(2) Any available information may be used in conducting the screening of a project, but where a responsible authority is of the opinion that the information available is not adequate to enable it to take a course of action pursuant to subsection 20(1), it shall ensure that any studies and information that it

considers necessary for that purpose are undertaken or collected.

(3) Where the responsible authority is of the opinion that public participation in the screening of a project is appropriate in the circumstances, or where required by regulation, the responsible authority shall give the public notice and an opportunity to examine and comment on the screening report and on any record that has been filed in the public registry established in respect of the project pursuant to section 55 before taking a course of action under section 20.

Commentary

This section obligates a responsible authority to screen a project and to prepare a screening report. It also provides relief from the application of the legal rules of evidence applicable in the Courts by permitting "any available information" to be used in conducting the screening of a project. By subsection (3), the responsible authority must decide if public participation in the screening is "appropriate in the circumstances". If it is found to be appropriate, public notice and an opportunity to examine and comment on the screening report, together with any record filed pursuant to it in the public registry is required.

CANADIAN ENVIRONMENTAL ASSESSMENT ACT

SECTION 20

20. (1) The responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the screening report and any comments filed pursuant to subsection 18(3):

(a) subject to subparagraph (c)(iii), where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is not likely to cause significant adverse environmental effects, the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out and shall ensure that any mitigation measures that the responsible authority considers appropriate are implemented;

(b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part; or

(c) where

(i) it is uncertain whether the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects,

(ii) the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects and paragraph (b) does not apply, or

(iii) public concerns warrant a reference to a mediator or a review panel,

the responsible authority shall refer the project to the Minister for a referral to a mediator or a review panel in accordance with section 29.

(2) Where a responsible authority takes a course of action referred to in paragraph (1)(a), it shall, notwithstanding any other Act of Parliament, in the exercise of its powers or the performance of its duties or functions under that other Act or any regulation made thereunder or in any other manner that the responsible authority considers necessary, ensure that any mitigation measures referred to in that paragraph in respect of the project are implemented.

(3) Where the responsible authority takes a course of action pursuant to paragraph (1)(b) in relation to a project,

(a) the responsible authority shall file a notice of that course of action in the public registry established in respect of the project pursuant to section 55; and

(b) notwithstanding any other Act of Parliament, no power, duty or function conferred by or under that Act or any regulation made thereunder shall be exercised or performed that would permit that project to be carried out in whole or in part.

Commentary

This provision provides for the environmental findings which are required to be made by the responsible authority as a result of its screening of the project, prior to its undertaking a regulatory function in relation to the project.

Where a responsible authority determines that a project may proceed with mitigation, subsection 20(2) requires the responsible authority to ensure that any necessary mitigation measures in connection with the project are implemented. This provision can have a bearing on the timing of the effective date of any abandonment order issued by the NEB, if the result of such an order might be to sunder Federal jurisdiction. In that case the NEB would lose the power to ensure that the necessary mitigation measures were undertaken.

CANADIAN ENVIRONMENTAL ASSESSMENT ACT

SECTION 59(b) - THE INCLUSION LIST REGULATIONS

59. The Governor in Council may make regulations

(b) prescribing, for the purpose of the definition "project" in subsection 2(1), any physical activity or class of physical activities;

Commentary

This provision provides for regulations which expand on the definition of "project" by including related physical activities. The *Inclusion List Regulations* made pursuant to this provision provides in section 15 therein for the inclusion of:

15. Physical activities relating to the abandonment of the operation of a pipeline that requires

leave under paragraph 74(1)(d) of the National Energy Board Act.

It is under this provision that related physical activities, such as the commencement of trucking as an alternative to the pipeline can be considered as part of the Board's environmental assessment.

Appendix 3B

NATIONAL ENERGY BOARD

SECTIONS RELATED TO THE CONSTRUCTION AND OPERATION OF PIPELINES

NATIONAL ENERGY BOARD ACT

"Pipeline" means a line that is used or to be used for the transmission of oil, gas or any other commodity and that connects a province with any other province or provinces or extends beyond the limits of a province or the offshore area as defined in section 123, and includes all branches, extensions, tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio and real and personal property and works connected therewith, but does not include a sewer or water pipeline that is used to proposed to be used solely for municipal purposes.

SECTION 29

29. (1) No person, other than a company, shall construct or operate a pipeline.

(2) Nothing in this section shall be construed to prohibit or prevent any person from operating or improving a pipeline constructed before October 1, 1953, but every such pipeline shall be operated in accordance with this Act.

(3) For the purposes of this Act,

(a) a liquidator, receiver or manager of the property of the company, appointed by a court of competent jurisdiction to carry on the business of the company,

(b) a trustee for the holders of bonds, debentures, debenture stock or other evidence of indebtedness by the company, issued under a trust deed or other instrument and secured on or against the property of the company, if the trustee is authorized by the trust deed or other instrument to carry on the business of the company,

and (c) a person, other than a company,

(i) operating a pipeline constructed before October 1, 1953, or

(ii) constructing or operating a pipeline exempted from subsection(1) by an order of the Board made under subsection 58(1), is deemed to be a company.

Commentary:

Pursuant to s. 29 of the NEB Act, only a "company" can construct and operate a pipeline. Exceptions to the requirement that a pipeline must be operated by a company are set out in subsections (2) and (3) of s. 29.

Section 2 defines "company" as follows:

"company" includes

(a) a person having authority under a Special Act to construct or operate a pipeline, and

(b) a body corporate incorporated or continued under the *Canada Business Corporations Act* and not discontinued under that Act.

Since the *Interpretation Act*, R.S.C. 1985, provides in s. 33(2) that singular words include the plural, the reference in the NEB Act to "company" must include "companies" A group of companies would therefore be entitled to construct an operate a pipeline under the NEB Act.

NATIONAL ENERGY BOARD ACT

SECTION 30

30. (1) No company shall operate a pipeline unless

(a) there is a certificate in force with respect to that pipeline; and

(b) leave has been given under this Part to the company to open the pipeline.

(2) No company shall operate a pipeline otherwise than in accordance with the terms and conditions of the certificate issued with respect thereto.

Commentary

This provision states that no company shall operate a pipeline unless there is a certificate in force with respect to the pipeline and leave to open has been given. Subsection (2) provides that no company shall operate a pipeline other than in accordance with the conditions of the certificate issued in respect thereto.

NATIONAL ENERGY BOARD ACT

SECTION 31

31. Except as otherwise provided by this Act, no company shall begin the construction of a section or part of a pipeline unless

(a) the Board has by the issue of a certificate granted the company leave to construct the line;

(b) the company has complied with all applicable terms and conditions to which the certificate is subject;

(c) the plan, profile and book of reference of the section or part of the proposed line have been approved by the Board; and

(d) copies of the plan, profile and book of reference so approved, duly certified as such by the Secretary, have been deposited in the offices of the registrars of deeds for the districts or counties through which the section or part of the pipeline is to pass.

Commentary

Section 31 prohibits a company from commencing construction of a section or part of a pipeline unless the Board has issued a certificate authorizing the company to construct, the company has complied with all applicable terms and conditions on the certificate and the plan, profile and book of reference have been approved and copies duly filed with the registrars of deeds.

NATIONAL ENERGY BOARD ACT

SECTION 48

48. (2) The Board may, with the approval of the Governor in Council, make regulations governing the design, construction, operation and abandonment of a pipeline and providing for the protection of property and the environment and the safety of the public and of the company's employees in the construction, operation and abandonment of a pipeline.

Commentary

This section provides the NEB with authority to make regulations, subject to the approval of the Governor in Council, with respect to the abandonment of a pipeline. The same provision also applies to international power lines by virtue of section 58.27 of the Act. However, in the case of power lines created by permit rather than certificate, sections 58.19 and 58.2 provide for the application of provincial laws. Section 58.19 (e) specifically provides that provincial laws relating to the "procedure to be followed in abandoning" apply in lieu of section 48. The focus of that provision on provincial laws relating to abandonment procedures, as a substitute for section 48 regulations, may assist in resolving any ambiguities concerning the true scope and ambit of power under section 48(2) of the Act.

NATIONAL ENERGY BOARD ACT

SECTION 52

52. The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipeline if the Board is satisfied that the pipeline is and will be required by the present and future public convenience and necessity and, in considering the application for a certificate, the Board shall have regard to all considerations that appear to it to be relevant, and may have regard to the following:

(a) the availability of oil or gas to the pipeline;

(b) the existence of markets, actual or potential;

(c) the economic feasibility of the pipeline;

(d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity of participating in the financing, engineering and construction of the pipeline; and

(e) any public interest that in the Board's opinion may be affected by the granting or the refusing of the application.

Commentary

This section provides that the Board, with the approval of the Governor in Council, may issue a certificate in respect of a pipeline. The Board must be satisfied that the pipeline is and will be required by the present and future public convenience and necessity. In hearing an application, the Board shall have regard to all matters it considers to be relevant. In addition, it may have regard to the specific issues listed in the section.

Generally, the Act concentrates on the construction and operation of the pipeline and is silent with respect to ownership. However, one of the factors the Board may have regard to under paragraph (d) is the financial structure and financial responsibility of the applicant and the methods of financing the pipeline.

NATIONAL ENERGY BOARD ACT

SECTION 58

58. (1) The Board may make orders exempting

(a) pipelines or branches of or extensions to pipelines, not exceeding in any case forty kilometres in length, and

(b) such tanks, reservoirs and storage facilities, pumps racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio, and real and personal property and works connected therewith as the Board considers proper,

from any or all of the provisions of sections 29 to 33 and 47.

(2) Repealed

(3) In any order made under this section the Board may impose such terms and conditions as it considers proper.

Commentary

This provisions authorizes the Board to exempt smaller pipelines or branches of or extensions to existing pipelines from any or all of the provisions in sections 29 to 33 and section 47. These provisions relate to the requirement that only companies operate a pipeline (s. 29); operation of the pipeline only after there is a certificate in force, leave to open has been granted and there has been compliance with the terms and conditions of the certificate (s. 30); commencement of construction only with appropriate Board approval (s. 31); filing of map and plan, profile and book of reference (ss. 32 and 33); and requirement for leave of Board to open (s. 47).

Appendix 4

LIABILITY AND LAND REGISTRATION ISSUES RELATING TO PIPELINE ABANDONMENT

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I. INTRODUCTION

You have requested that we research certain liability issues and land registration issues which may arise upon the abandonment of a pipeline. As far as liability is concerned, this memorandum addresses contractual liability that arises out of the covenants and conditions which are contained within a typical easement agreement and common law liability which may exist under a number of tort causes of action. How certain provisions of the *National Energy Board Act* ("NEB Act") potentially affect a pipeline company's property interest in an abandoned pipeline and its liability therefor is also examined.

As far as land registration issues are concerned, this memorandum addresses how pipeline easements are registered in Alberta, the manner in which discharges of registration are effected and the manner in which information regarding pipeline easements is recorded in Land Titles, both during the term of a registration and following a discharge of registration after abandonment.

II. ISSUES

A. Liability in Property and Contract

1. Do the covenants and conditions contained in an easement agreement survive the abandonment of the pipeline and the ensuing termination of the easement?
2. If the covenants and conditions in such an agreement survive abandonment and termination of the easement, do those terms and conditions run with the land or can they be assigned so as to accrue to the benefit of all subsequent owners of the land?

B. Liability in Tort

1. Will the pipeline company be strictly liable pursuant to the rule in *Rylands v. Fletcher* in respect of any damage caused as a result of pipeline abandonment?
2. Will the pipeline company be liable in nuisance in respect of any damage caused by pipeline abandonment?
3. Will the pipeline company be liable in negligence as a result of any damages caused as a result of pipeline abandonment?

C. Liability and Property Interest Under the NEB Act

1. Does section 75 of the NEB Act operate to affect the determination of a pipeline company's liability for damages arising from the abandonment of a pipeline?
2. What is the effect of abandonment on the preservation of a pipeline company's property interest in a pipeline under section 111 of the NEB Act?

D. Land Titles Registration Issues

1. How are pipeline easements registered in Alberta?
2. Upon abandonment, how are these registrations discharged?
3. Following discharge, what historical records does Land Titles maintain and how are those records accessed?

III. SUMMARY OF CONCLUSIONS

A. Liability in Property and Contract

1. In our opinion, a court would typically find that the covenants and conditions in an easement agreement regarding reclamation, damage, indemnity and liability would survive abandonment of the pipeline and termination of the easement. While a pipeline easement ceases to exist as an interest in land upon the abandonment of the pipeline, the covenants in an agreement will, depending on their specific language, continue to be enforceable in contract.
2. In our opinion, the entitlement of a land owner to enforce proper reclamation, pursue damages and obtain indemnity for liability are benefits which will cease to run with the land upon abandonment. However, that entitlement may be assignable under the easement agreement. In most cases, for an assignment to be effective, it will have to comply with the *Judicature Act* provisions concerning assignment of contracts and, accordingly, it will have to be in writing and written notice of it must be provided to the pipeline company.

B. Liability in Tort

1. There is likely no strict liability under *Rylands v. Fletcher*. In this regard, strict liability only arises if the damage occurs as a result of escape of a dangerous thing from land at the time of occupation of the land. It is likely that the damage would not occur in the case of pipeline abandonment until after the pipeline company had completed abandonment leading to the termination of the easement and, therefore, it would no longer be in occupation so as to give rise to potential strict liability.
2. The issue of liability in nuisance may depend upon whether the damage occurs upon the parcel of land that was the subject of the easement or on other land. There is lower court authority that suggests that the nuisance complained of must have arisen elsewhere than on the land which is in the plaintiff's sole occupation. Accordingly, if the damage occurs to the parcel of land that was once subject to an easement after it was terminated, the then-holder of the easement cannot be made liable in nuisance. However, if the damage or interference relates to property adjoining that land, both the pipeline company and the land owner face potential liability in nuisance to both the owner of the adjoining property and third parties. To the extent that the land owner was held liable for any injury or damage caused by improper abandonment of the pipeline, the owner could likely claim contribution and indemnity from the pipeline company under joint tort feasors legislation.
3. If the pipeline were improperly abandoned and the court found that the pipeline company failed to meet the required standard of care in abandoning the pipeline, there would be possible liability for negligence. Accordingly, the establishment of technical and engineering standards is important as they will be persuasive evidence of the *prima facie* standard of care on abandonment. Insofar as any loss in value of the land is concerned due to improper reclamation, liability in negligence may raise an issue of pure economic loss. Recent case authority suggests that remediation of effects arising out of abandonment may only be required if the defects pose a potential hazard to health and safety. However, if any property damage or personal injury occurs as a result of improper abandonment, the pipeline company would be liable for all ensuing loss if it was proven that it had failed to meet the relevant standard of care in abandoning the pipeline.

C. Liability and Property Interests Under the NEB Act

1. While section 75 provides that a pipeline company is required to make full compensation for all damages arising from its pipeline operations, it specifies that such compensation be made in the manner provided in the NEB Act. Specific remedies, including arbitration, are set out in the NEB Act for determining compensation for damages arising from pipeline operations where such compensation cannot be determined by agreement. However, those remedies are only available in relation to damages arising from certain activities, which arguably do not include abandonment and, further, they are not applicable to claims for loss of life or personal injury. Such claims fall to be determined according to principles of common law. In any event, the National Energy Board ("NEB" or "the Board") may cease to have jurisdiction over a pipeline upon the issuance of an abandonment order in respect thereof. It follows, therefore, that any person who makes a claim for damages arising after the abandonment of a pipeline may be restricted to his or her remedies at common law.
2. Under section 108 of the NEB Act, it is contemplated that a pipeline may be constructed on, over, under, or along certain Crown property or utilities. The purpose of section 111 is to preserve a pipeline company's interest in, and the statutory authority to construct, operate and maintain, a pipeline where it becomes affixed to such Crown property or utility. That property interest would otherwise be subject to uncertainty stemming from the property law principle that if a chattel becomes sufficiently attached to land, it is transformed into a fixture and thereby becomes part of the real property. The determination of whether a chattel becomes a fixture is a matter of objective intention. If it is accepted that the issuance of an abandonment order effects a termination of the NEB's jurisdiction over a pipeline, then section 111 arguably ceases to apply and the property interest in the pipeline is left to be determined according to principles of property law having regard to the facts of the particular case and any agreements which may be in place. There are several factors which weigh against a pipeline company's intention to maintain its property interest in an abandoned pipeline including the act of abandonment in place, the time which may pass between abandonment and, if applicable, the removal of the pipeline, and the degree of property damage required to effect the detachment of the pipeline from the land.

D. Land Registration Issues

1. There are a number of different ways a pipeline easement can be registered under the Alberta *Land Titles Act*. This includes a caveat, by easement or utility right-of-way agreement, by a registered right-of-way plan or, in presumably exceptional circumstances where fee simple title is taken to the lands within the right-of-way, through the issuance of a Certificate of Title.
2. Abandonment of a pipeline does not lead to automatic discharge of any type of registration. Generally speaking, the most common way for registrations to lapse is by a voluntary discharge by the pipeline company upon abandonment. Absent such a discharge, affirmative steps would have to be taken by the land owner in order to rid title of the registrations following abandonment. It should be noted, however, that registration does not create the interest in land. A pipeline easement may continue to be registered even though it has expired in accordance with its terms. In this regard, it is like a mortgage or encumbrance that continues to be registered even though the secured obligation is paid.
3. Land Titles maintains historical records in perpetuity. Upon discharge of a registration, a historical search may be performed in respect of specified property over which a pipeline once ran in order to obtain copies of the previously filed documents, including any registered plan that may have been filed. There is no way of searching Land Titles by the name of a pipeline company which has registered its interest. Thus, the general route of the pipeline must be known in order to ascertain the land which it crossed and which would form the basis for a search of historical information.

IV. ANALYSIS

A. Liability in Property and Contract

1. Survival of Terms and Conditions After Termination of Easement

There are a number of methods by which an easement may be brought into existence. Insofar as pipelines are concerned, easements are typically acquired either by express grant or by special rights conferred by statute.[1] Where such an easement is acquired by express grant, the duration of the easement, absent words of limitation, must be determined with regard to the surrounding circumstances. On the subject of termination of easements, the author of *Principles of Property Law* states the following:

> An easement may be expressly released by agreement, or impliedly released, through abandonment. As in the case of an abandonment of chattels, there must be an intention to abandon and a sufficient manifestation of relinquishment. This may be inferred by a change in the nature of the dominant tenement that renders the easement useless, or by virtue of a similar change in the servient lands to which the dominant owner does not object. Whether these circumstances can show a subjective intention to abandon is a question of fact and the onus of proof on a party alleging that a property right has been relinquished is a heavy one.[2] [Footnotes deleted.]

A typical description of the easement and the rights granted to a pipeline company and their respective durations is exemplified by the following granting clause in a typical easement agreement:

> DO HEREBY GRANT, CONVEY AND TRANSFER to [Pipeline Company] an easement _____ metres (_____ feet) in width (also referred to as the "right-of-way") in, on, over, under, across and through the land as shown on a plan of survey of record in the Land Titles Office for the North Alberta Land Registration District as Plan No. _____, for the construction, operation, maintenance, inspection (including aerial), alteration, removal, replacement, reconstruction and repair of one or more pipelines subject to Clause 18 herein and other facilities appurtenant or incidental thereto (the "Pipeline") for the transportation, storage and handling of oil, other liquid and gaseous hydrocarbons and products thereof together with the right of ingress and egress to and from the right-of-way for [Pipeline Company], its personnel, equipment, contractors and agents for all purposes necessary or incidental to the exercise and enjoyment of the rights herein granted.
>
> The rights and easement are granted as and from the date hereof and **for so long hereafter as [Pipeline Company] desires to exercise same** on the following terms and conditions which are hereby mutually agreed to:...

It seems apparent that, in the context of pipeline easements, a pipeline company's intention to abandon an easement will be clearly manifest inasmuch as the pipeline company is required to seek leave to abandon the operation of the pipeline from the appropriate regulatory board having jurisdiction.[3]

Having regard to the language of a typical easement agreement, the rights and easement are granted thereunder only for so long as the pipeline company desires to exercise them. The bringing of an application to abandon a pipeline and the issuance of an abandonment order in respect thereof should be sufficient evidence that the pipeline company no longer desires to do so. It should be noted however, that the wording of all easements is not the same with respect to the duration of an easement and must be carefully reviewed for words of limitation.

While it may seem clear that the abandonment of a pipeline effects the termination of a pipeline easement, an issue remains as to whether the terms and conditions contained therein survive the termination. To determine the scope of the respective rights and obligations under the easement, primary regard must be

had to the specific wording of the easement agreement in issue. However, it is important to note that while an easement might originate in an agreement between two parties, it constitutes more than a mere contractual right and becomes a benefit annexed to the land so as to run with the land without express assignment. In this latter regard, the author of *Principles of Property Law* states the following with regard to easements: "Owing to this quality, they resemble the real covenants that run with the assignment of a leasehold interest... As with the study of real covenants in leases, the analysis here returns to the dividing line that separates contract and property." [4] The difficulty which therefore presents itself is whether the problem is to be resolved according to the law of property or the law of contract.

On the basis that the abandonment of a pipeline effects the termination of the pipeline easement, it follows that the covenants which are incidental thereto also cease to exist. This would suggest that the grantor of an easement can only recover for breaches of covenants to the date of the termination. However, that proposition is questionable on the basis of the Supreme Court of Canada decision in *Highway Properties Ltd. v. Kelly, Douglas & Co. Ltd.* [5] While that case dealt with a dispute as between a landlord and tenant, the principles it established are arguably relevant to the discussion of easements.

In that case, the plaintiff landlord owned a small shopping centre and the defendant tenant agreed to lease a large space within it for a supermarket. The lease required the tenant to carry on business continuously once possession was taken up. However, the store was not a success and the tenant abandoned the property before the end of the term of the lease. The landlord subsequently advised the tenant that it would retake the premises and hold the tenant liable for the damage resulting from the wrongful repudiation of the lease. The traditional rule in relation to the surrender of leases was that acceptance by the landlord ended the tenant's estate and, with it, the tenant's obligation to pay rent and the right to sue for ancillary future losses. [6]

However, Laskin, J., speaking for the Court, effectively overruled that principle and stated as follows:

> It is no longer sensible to pretend that a commercial lease, such as the one before this Court, is simply a conveyance and not also a contract. It is equally untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because the covenants may be associated with an estate in land. [7]

Accordingly, the landlord could sue for prospective losses under the contract. Laskin, J. suggested that, in any event, even the traditional rule would have no application "where both parties evidenced their intention in the lease itself to recognize a right of action for prospective loss upon a repudiation of the lease, although it be followed by the termination of the estate." [8] While these latter remarks are arguably *obiter*, they remain instructive in the present context as an easement agreement may contain language which suggests that liability for breaches of its covenants is intended to survive the termination of the easement.

Extending the principles enunciated by Laskin, J. to pipeline easements, it follows that while the interest in land and the covenants ancillary thereto cease to exist on abandonment of the pipeline, the grantor of the easement may still have its remedies in contract. The following statement of Haddad, J.A. of the Alberta Court of Appeal in *Shelf Hldg. Ltd. v. Husky Oil Operations Ltd.*, a case concerning the nature of a pipeline easement, lends support to this proposition:

> The grant of easement must be recognized as a contract reflecting the terms of the agreement made by the contracting parties. It is elementary that any contract is the primary source of reference to determine a dispute involving the rights and obligations of those parties. [9]

Under a typical agreement, the land owner grants the above noted rights and easement, and covenants not to interfere therewith, in consideration for the payment of a sum of money by the pipeline company to the

land owner and the pipeline company covenanting to perform and observe a number of terms and conditions. The terms and conditions of a typical easement agreement with respect to liability for damages suffered by the land owner and third parties, and the obligation to restore the land subject to the easement are set out below and discussed in turn.

a. Liability for Damages and Indemnity

[Pipeline Company] will compensate the Owner for all damages suffered as a result of its operation.

[Pipeline Company] shall indemnify the Owner from all liabilities, damages, claims, suits and actions arising out of the operations of [Pipeline Company] other than liabilities, damages, claims, suits and actions resulting from the gross negligence or willful misconduct of the Owner.

These provisions are required to be included in a land acquisition agreement for a pipeline under s. 86(2) of the NEB Act. [10] Insofar as a pipeline company's obligation to compensate a land owner for damages and liability to third parties arising out of its operations are concerned, there are no words of limitation. This raises the issue that a pipeline company may not only be liable for damages arising during the life of the easement, but also for damages which may arise prospectively after the termination of the easement.

These provisions, on their wording, are arguably intended to continue to have effect after the easement has come to an end. There is no indication that the damages or liability for which the land owner is to be compensated must arise during, or within the period of the pipeline company's active operations. [11] Furthermore, there is no suggestion in those provisions or elsewhere in a typical easement agreement that time is of the essence or that there is a certain defining event or act which effects the termination of the rights under the contract.

While liability for damages or liability will probably continue under an easement agreement after pipeline abandonment, the limitation periods in effect in the various common-law provinces may affect the pursuit of remedies under the agreement. We do not, however, think that an abstract discussion of possible limitation periods would be useful given the complexity and fact dependency as to when a cause of action arises.

b. Obligation to Restore Lands

Upon the discontinuance of the use of the said right-of-way and of the exercise of the rights hereby granted, [Pipeline Company] shall and will restore the said lands to the same condition, so far as it is practicable so to do, as the same were in prior to the entry thereon and the use thereof by [Pipeline Company].

On the basis that the obligation to restore the lands to their original condition only arises after the abandonment of the easement, it is apparent that the parties to a typical easement agreement do not intend it to end upon such abandonment. Under such an agreement, the pipeline company is required to restore the lands subject to the easement to their original condition after it ceases to use the easement and exercise the rights granted. The use of the word "upon" arguably denotes contemporaneity, which suggests that the pipeline company must undertake the restoration of the said lands within a reasonably short period of the abandonment of the easement. [12]

It is not clear on the wording of this provision what is captured by the term "lands". This raises the question of whether the lands are restricted to the mere surface of the area subject to the easement or if they include

the soil underlying the surface so as to require the removal of the pipeline. [13] The qualification that the restoration be done "so far as it is practicable so to do" is of little assistance to the pipeline company in this regard. "Practicable" merely denotes that something is capable of being done, in contrast to what is practical, which is capable of being done usefully or not at too great a cost. [14] While industry custom and practice presumably favours leaving an abandoned pipeline in place, the wording of this particular provision is open to an interpretation requiring removal of the pipeline. It should be noted that, although not included in the "typical easement" which forms the basis for the analysis in this memorandum, there are a number of forms of easements that specifically provide that the pipeline may be left in place following surrender of the easement.

2. Assignment and Running of Covenants with Land

A typical easement agreement provides for its assignment by either the land owner or the pipeline company without the consent of the other. Further, it may provide that the easement is of the same force and effect as a covenant which runs with the land. In this regard, the agreement we reviewed provided as follows:

> Either party shall have the absolute right to assign this Agreement in whole or in part, and upon such assignment, shall give to the other party written notice thereof within ten (10) days, but [Pipeline Company] need not give such notice upon assignment in the course of its corporate financing by way of a deed of trust, mortgage, debenture or a floating charge or upon an assignment arising out of an amalgamation or merger.

This easement is, and shall be, of the same force and effect as a covenant running with the land and this Agreement shall extend to, be binding upon and enure to the benefit of the heirs, executors, administrators, successors and assigns of the Owner and [Pipeline Company], respectively.

The latter provision arguably merely reflects the law as it is set out in s. 72 of the *Land Titles Act* which overcomes the difficulty that a pipeline easement does not satisfy the characteristics of an easement at common law requiring, among other things, that it serve a dominant tenement.[15] However, the terms of an easement with respect to assignment and its effects raise more difficulties. The issue which arises is whether the terms and conditions which are ancillary to the grant of easement will be enforceable by the assignee as against the original grantor or grantee, as the case may be. This requires a review of the principles governing the running of covenants with land and the assignment of contracts.

a. Running of Covenants with the Land

The law of landlord and tenant is instructive with respect to the rules applicable to the running of benefits and burdens under a grant of easement with land. This is supported by the following passage from *Gale on Easements* with respect to an obligation to repair under a grant of easement:

> If such a provision were contained in a grant of an easement for a term of years, its benefit and burden would run, no doubt, in accordance with the rules applicable to covenants and leases. [16]

When there is an assignment of a landlord's or tenant's full interest under a lease, the assignee acquires the estate initially held by the original landlord or tenant as the case may be. However, whereas there is privity of contract as between the original landlord and tenant, there is no privity of contract as between the landlord or tenant, as the case may be, and the assignee. Nevertheless, there remains a relationship between the two which is explained as follows in Ziff's *Principles of Property Law*:

> [T]here is a direct tenurial relationship between the two - a *privity of estate* - and this governs

> the rights and obligations owed directly between the original landlord and the new tenant by assignment. Not all terms contained in the head lease will apply between these two parties: under the rule in *Spencer's case* [(1583), 77 E.R. 72], only those so called *real covenants* in the original lease will run with the transfer of the lease into the hands of the assignee. A comparable rule applies where the landlord assigns the reversionary interest in the property. If that occurs, the new landlord does not share privity of contract with the original tenant, but they are in privity of estate with one another. [17]

Real covenants are those that are said to "touch and concern" the land. There is very little in the way of Canadian authority on the application of this requirement, however, in *Merger Restaurants v. D.N.E. Foods Ltd.*, [18] Philp, J.A. held that such covenants must effect the nature, quality, or value of the land, or the type of use to which it is put. Accordingly, a covenant to repair will clearly run with the land. On the other hand, a covenant to indemnify one or the other party to the agreement against third party liability is arguably personal to the contracting parties and should not necessarily run. That said, the dividing line between those covenants which are considered personal and those which run with the land has not always been so clearly drawn by the case law. Of course, all of this depends on the existence of the easement and the covenants which are ancillary thereto. Effectively, these principles are only relevant to a transfer of land before the easement is terminated by the abandonment of the pipeline.

b. Assignment of Contracts

In any event, it is conceivable that the *Judicature Act*[19] carries the law a step further, and, whether the covenant runs with the land or not, the assignee of the reversion of term may sue or be sued on any covenant expressly assigned. However, where there is a dispute between assignees without an express assignment, contract principles are no longer relevant.

Assignment, in the contractual context, involves the transfer of rights arising under a contract to a person who was not originally a party to it. Historically, contractual rights were unassignable at common law in the sense that an assignee was unable to sue for recovery of a benefit under the contract in his own name. [20] However, the courts of equity were prepared to treat a benefit under a contract as a piece of property capable of being dealt with like any other property that could be assigned. [21] When the powers of the courts of equity and law were combined in a single court under the United Kingdom *Judicature Act* in 1873, a provision was included which dealt specifically with assignments. The essence of that provision was re-enacted in all of the Canadian provinces. In Alberta, it took the form of s. 21 of the *Judicature Act*:[22]

> 21(1) When a debt or other legal chose in action is assigned by an absolute assignment made in writing under the hand of the assignor and not purporting to be by way of charge only, if express notice in writing of the assignment has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, the absolute assignment is effectual in law to pass and transfer
>
> > (a) the legal right to the debt or chose in action from the date of the notice of the assignment,
> >
> > (b) all legal and other remedies for the debt or chose in action, and
> >
> > (c) power to give a good discharge for the debt or chose in action without concurrence of the assignor,
>
> and is subject to all equities that would have been entitled to priority over the right of the

assignee if this section had not been enacted.

Thus, assignments are authorized by statute, provided that:

- the assignment is absolute (by which the entire interest of the assignor in the chose in action is transferred to the assignee),
- the assignment is made in writing, and
- written notice of the assignment is provided to the other party to the contract.[23]

No consideration is required for an assignment under the statute. Nevertheless, the statute has made no change in the requirement that the interest to be assigned must be one that can be assigned under the law. That is to say that a contract may exclude assignment by its terms. Furthermore, contracts involving personal relations, or personal skills, are not assignable. This limitation was articulated by O'Connor, C.J.A. in *Blanchette Neon Ltd. v. Charlie Jin*[24] in which he adopted the following statement from *Tolhurst v. Assoc. Portland Cement Co.*: "[T]here is a clear right to assign a contract where no services depending on individual skill or personal confidence are required." [25]

In the case of *Maloney v. Campbell*, the Supreme Court of Canada had to decide whether an obligation to indemnify the grantor of a mortgage in respect of his personal covenant to pay the sum mortgaged was assignable. King, J., speaking for the Court, stated:

> Agreements are said to be personal in this sense when they are based on confidences, or considerations applicable to special personal characteristics, and so cannot be usefully performed to or by another. An agreement to indemnify against payment of a possible money demand is no more personal in this sense than is one to indemnify against payment of a definite and mature liability or an agreement to pay a sum of money for another. [26]

Hence, an agreement to indemnify against payment of a possible money demand was assignable.

Applying these principles to the instant case, it appears likely that a court would determine that the provisions of a typical easement agreement, both with respect to the obligation to restore the lands and indemnification, would be assignable. However, it should be kept in mind that for such an assignment to be valid, it must comply with the requirements under the *Judicature Act* or, at a minimum, with the written notice requirement under the terms of the agreement.

B. Liability in Tort

1. Strict Liability

The elements of the tort of strict liability are as follows:

1. the defendant is in lawful occupation of property;
2. a dangerous agent is stored on the defendant's property which makes for a non-natural use of the land;
3. the agent escapes from the defendant's property;
4. the agent causes damage to the plaintiff.

The modern doctrine of strict liability derives from the rule in *Rylands v. Fletcher*, [27] which is a 19th century English case in which the defendant hired an independent contractor to construct a reservoir on his land. The contractor failed, in the construction of the reservoir, to take into account the existence of old

mine shafts beneath the reservoir. When the reservoir was filled, the shafts gave way and water flowed through to the plaintiff's new mine works. In imposing liability, Blackburn, J. enunciated the following principle:

> [T]he person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, he is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of *vis major*, or the act of God ... .[28]

The House of Lords upheld Blackburn, J.'s decision, but in so doing, Lord Cairns drew a distinction between natural and non-natural uses of land, and limited liability to cases where damage resulted from the non-natural use of land. [29] The meaning of the phrase non-natural use was considered by the Privy Council in *Rickards v. Lothian* in which Moulton, L.J. stated:

> It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community. [30]

Liability under the rule in *Rylands v. Fletcher* is not confined to owners of land. If a defendant has a licence on or under the land of another, that defendant might be liable if the thing he or she brings onto the land, in accordance with the licence, escapes and causes damage to another. [31] What is essential is that the defendant should be in occupation of the land or have some right to use the land so as to entitle the defendant to bring onto the land that which, upon its escape, brings the doctrine into play.

Several cases have narrowed the definition of the defendant's property to expand upon the circumstances in which there can be said to have been an escape. Accordingly, electrical wires have been considered to be property such that a break in a wire was an escape, [32] and a water main was restricted to the actual pipe so that any leakage constituted an escape. [33]

It seems fairly clear that, in most circumstances, a pipeline operator will be held to be strictly liable for damage to property or injury to persons arising from a leak of a transmitted substance in the course of the operation of the pipeline. However, assuming that the effect of abandonment is to bring to an end any grant of easement for the pipeline and, accordingly, the pipeline operator's property interest in the pipeline, there would be a strong argument that the pipeline operator is no longer in occupation of the easement and, therefore, has no control over any substance that escapes from the pipeline. [34] While it follows that a pipeline operator is unlikely to be held strictly liable, the pipeline operator might nevertheless be held liable in negligence or nuisance.

Insofar as the owner of the land on which the abandoned pipeline is located is concerned, it appears unlikely that the land owner would be held strictly liable for an escape from the pipeline. This is because the pipeline operator would not be considered an independent contractor for which the land owner, under the rule in *Rylands v. Fletcher*, could be held vicariously liable. [35]

2. Nuisance

The basic principle of private nuisance is that a defendant may not cause a substantial and unreasonable interference with the plaintiff's use and enjoyment of its land. Nuisance claims typically concern plaintiffs and defendants who are occupiers of neighbouring parcels of land. However, non-occupiers of land have

also been held liable for creating a private nuisance. Generally speaking, a person is responsible for the unreasonable interference with a person's use and enjoyment of land where he or she has:

- Created the nuisance;
- Authorized the creation of the nuisance;
- Permitted the nuisance to continue, regardless of whether he or she has caused the nuisance; or
- Permitted others to create the nuisance by their foreseeable actions (i.e., vicarious liability for employees or contractors, which is not relevant to the relationship between a land owner and a pipeline company and is, therefore, not addressed here).

a. Creating the Nuisance

In *Jackson v. Drury Construction Co.* [36] the Court of Appeal of Ontario held the defendant contractor liable for the pollution of the plaintiff's well. During the course of reconstructing a county road, the defendant's blasting operations opened up fissures in the bedrock that allowed material from a piggery to escape into the underground water that fed into the plaintiff's well. The Court held that, even though the plaintiff's well was polluted by a source other than the defendant's property, the defendant would be liable in private nuisance because the plaintiff's well was polluted as a direct result of the defendant's blasting operations. The Court stated as follows:

> In an action for nuisance, liability attaches to anyone who either creates or causes a nuisance, and the cause of action is not dependent on the person being in occupation of the premises from which the nuisance emanates. [37]

In *Salmond on the Law of Torts* it is suggested that the liability of a non-occupier should depend on a positive act of misfeasance:

> Does a person who is in occupation of premises on which there is a nuisance, and who is liable for that nuisance by virtue of his occupation, cease to be liable when he ceases to occupy? Does a vendor of land, for example, put off his responsibility along with his ownership? Or does the liability of a tenant cease with the assignment, surrender, or determination of the lease? On this point, there is little authority, but it is submitted that (except in the case of nuisance by positive misfeasance) liability dependent on occupation lasts only so long as the occupation on which it is based. In the case of positive misfeasance however, this is not so. Liability of this kind is based not on occupancy but on the doing of the act which creates the nuisance; and its continuance, therefore, is independent of the ownership or occupation of the property on which the act is done.
>
> .....
>
> He who by himself or by his servants by a positive act of misfeasance (as opposed to a mere non-feasance, such as an omission to repair) creates a nuisance is always liable for it, and for any continuance of it, whether he be the owner, the occupier or a stranger, and notwithstanding the fact that it exists on land which is not in his occupation, and that he has therefore no power to put an end to it. [Footnotes deleted.] [38]

From the perspective of a pipeline operator, it is most likely that a nuisance caused by an abandoned pipeline would only arise after the pipeline had been abandoned for some time. Presumably, most problems would be the result of corrosion of the pipeline, loss of buoyancy control or loss of cover. Accordingly, a pipeline operator could argue that the nuisance was the result of an omission to repair which, being a non-feasance, is not actionable. However, it is still likely that the initial installation and abandonment of the

pipeline would be construed as positive acts which led to the nuisance and were antecedent to the omission to repair. While the creation of an interference with a land owner's property interest is unlikely to be the immediate result of these acts, it is substantially certain to follow. [39]

However, regardless of whether or not a pipeline operator's liability in nuisance for an abandoned pipeline depends on an act of misfeasance, the traditional view remains that the nuisance must originate from property other than the plaintiff's property. This proposition is stated as follows in *Salmond on the Law of Torts*:

> As nuisance is a tort arising out of the duties owed by neighbouring occupiers, the plaintiff cannot succeed if the act or omission complained of is on premises in his sole occupation. The nuisance must have arisen elsewhere than in or on the plaintiff's premises, whether it is a common law or a statutory nuisance. A nuisance is therefore usually created by acts done on land in the occupation of the defendant, adjoining or in the neighbourhood of that plaintiff. [40]

Lower court authority for this proposition was provided by Locke, J. of the British Columbia Supreme Court in *Engemoen Hldg. Ltd. v. 100 Mile House*. [41] In that case, the plaintiff owners of a shopping centre sued the defendant village which had a licence to keep a water main underlying the plaintiff's property. Damages were claimed when a leak in the water main caused part of the shopping centre to settle. The defendant was held not to be liable in nuisance because the break which caused the damage occurred on the plaintiff's property. [42]

An issue arises as to whether some degree of occupation results from a pipeline easement, such that the plaintiff land owner is not in exclusive occupation of his or her lands. The Alberta Court of Appeal considered this issue in *Husky Oil Operations Ltd. and Alberta Inspector of Land Titles v. Shelf Holdings Ltd.*. [43] In that case, the Court held that a pipeline easement does give certain rights of exclusive possession to the holder of the easement sufficient to establish occupation, but that it is not an interest in land yielding exclusive rights consistent with ownership. However, in the context of abandoned pipelines, a pipeline operator's occupation should be viewed as having come to an end with the termination of the easement and, accordingly, the pipeline operator would be viewed as a non-occupier.

b. Authorizing the Creation of a Nuisance

Liability for authorizing the creation of a nuisance has been restricted to the landlord/tenant relationship. [44] The rule has been stated as follows:

> In general, a landlord is not liable for nuisance committed by his tenant, but to this rule there is, so far as now in point, one recognized exception, namely, that the landlord is liable if he has authorized his tenant to commit the nuisance.
>
> ....
>
> But, this exception has, in the reported cases, been rigidly confined to circumstances in which the nuisance has either been expressly authorized or is certain to result from the purposes for which the property is let. [45]

A landlord's liability in private nuisance normally depends on whether a nuisance is certain to result from the purposes for which the property is let or, in other words, where the nuisance is the natural and necessary result of what the landlord authorized the tenant to do.

Based on the restriction of this rule to the landlord/tenant relationship, it is unlikely that it can be used to shift liability for a nuisance arising from an abandoned pipeline from the pipeline operator to the owner of the land upon which the abandoned pipeline is located. Furthermore, it may be difficult to show that the nuisance created was the natural and necessary result of what the land owner authorized the pipeline operator to do by grant of easement, particularly if it is assumed that the proper abandonment of the pipeline is an explicit or implied term of the grant.

c. Permitting a Nuisance to Continue

A person may, however, be held liable in private nuisance for allowing a nuisance, created by another person, to continue. The leading case on this point is *Sedleigh-Denfield v. O'Callaghan*. [46] In that case, the defendant occupier had a drain installed on his land in a man-made ditch. The critical fact was that the municipality that installed the drain did not have the defendant's consent and was found to be trespassing. The drain plugged up and flooded the plaintiff's land. The Privy Council found that the nuisance had been created by the trespassing municipality but, notwithstanding this, it held the defendant occupier liable. The Privy Council stated that an occupier of land subject to a nuisance which he did not create was still liable in nuisance if he adopted the nuisance or suffered its continuance. The occupier would be found to adopt the nuisance if he made use of it after taking occupation, and he would be seen to suffer its continuance if he allowed the nuisance to continue after he was aware of it or after it should have come to his attention. In that case, the defendant had made use of the nuisance to drain his own land and was thus found to have adopted it. [47]

In *Salmond on the Law of Torts*, it is stated: "... an occupier is liable even for a continuing nuisance which already existed on the premises when he first entered into possession of them." [48] This statement of law has been sustained by Lord Wilberforce in *Goldman v. Hargrave*. Quoting from *Salmond on the Law of Torts*, Lord Wilberforce stated:

> When a nuisance has been created by the act of a trespasser or otherwise [e.g. a predecessor in title] without the act, authority, or permission of the occupier, the occupier is not responsible for the nuisance unless, with the knowledge or means of knowledge of its existence he suffers it to continue without taking reasonably prompt and efficient means for its abatement. [49]

One of the most difficult problems Lord Wilberforce had to deal with was the scope of the duty involved. Lord Wilberforce considered it unjust to hold a person of modest means responsible to abate the nuisance that was created through no fault of his or her own and attempted to explain the duty of care an occupier would have in such circumstances. He stated:

> [T]he matter cannot be left there without some definition of the scope of his duty. How far does it go? What is the standard of the effort required? What is the position as regards expenditure? It is not enough to say merely that these must be "reasonable" since what is reasonable to one man may be very unreasonable, and indeed ruinous, to another: the law must take account of the fact that the occupier on whom the duty is cast, has, *ex hypothesi*, had this hazard thrust on him through no seeking or fault of his own. His interest, and his resources whether physical or material, may be of a very modest character either in relation to the magnitude of the hazard, or as compared with those of his neighbour. As a rule which required of him in such unsought circumstances in his neighbours interest a physical effort of which he is not capable, or an excessive expenditure of money, would be unenforceable or unjust. One may say in general terms that the existence of a duty must be based on knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it. [50]

In the present circumstances, it may be suggested that a land owner will be liable for a nuisance created by the grantee of an easement across his or her land even after that easement has been terminated. However, the duty is limited by the personal circumstances of the owner.

In any event, the land owner would probably be able to seek contribution and indemnity from the pipeline company, either under the conditions and covenants in the easement agreement or under joint tort feasor legislation. This of course is only possible if the pipeline company still exists and has sufficient assets to make good on an indemnity obligation.

3. Negligence

Negligence law is designed primarily to compensate victims of accidents. Its effect is to deter careless conduct and encourage prudent behaviour between those who stand in a relationship giving rise to a duty of care. To define acceptable forms of behaviour, the courts fix standards of care that are reasonable or conform to the practice or custom relating to the activity under scrutiny. To maintain an action in negligence a plaintiff must establish that:

1. the defendant owed the plaintiff a duty of care;
2. the duty had to be met to a specified standard;
3. the defendant breached that duty; and
4. the breach caused the plaintiff actual loss.

Unlike nuisance and trespass actions, a negligence claim does not depend on interference with the use and enjoyment of land, nor is negligence restricted to occupiers of land.

a. Duty of Care

The existence and extent of a duty of care must be considered when determining whether an action in negligence can succeed. The duty of care has been described as an obligation to avoid behaviour that causes an unreasonable risk of damage to others. Atkin, L.J. defined the relationship that gives rise to a duty of care in the celebrated case of *Donoghue v. Stevenson* as persons who "are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question." [51]

Whether a duty arises depends upon the circumstances of the case. The duty of care is confined to that class of persons that falls within a foreseeable range of risk. The notion of foreseeability is essential to determining whether a duty of care exists. [52]

The Supreme Court of Canada recently defined the existence and scope of the duty of care in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.* [53] In that case, the Supreme Court of Canada adopted the approach enunciated as follows in the English decision of *Anns v. Merton London Borough Council*: [54]

1. Is there a sufficiently close relationship between the parties so that, in the reasonable contemplation of the defendant, negligence on its part might cause damage to another?
2. Are there any factors that may limit or negate the scope of that duty, the class of persons to whom that duty is owed or the damages arising from the breach of the duty?

The second branch of the test apparently stems from an attempt by the courts to control the growth of negligence liability by taking into account other social needs, policies and objectives.

In the context of abandoned pipelines, establishing that a duty of care is owed by a pipeline operator to a particular party will depend on the particular facts of the case. However, it is probably safe to say that a duty of care will not be difficult to establish in most reasonably conceivable situations in which injury or damages might arise.

b. Standard of Care

To succeed in negligence, a plaintiff must demonstrate that the behaviour of the defendant fell below a standard of reasonable care under the circumstances. In general terms, the standard of care is determined by examining what a reasonable person would have done under the circumstances. The reasonable person has been described as a person of normal intelligence who acts prudently in accordance with the prevailing and approved practices. [55] Where applicable, the courts may look to standards established by statute, regulation or bylaw in determining what is the appropriate standard of care. The court may consider the legislation's policy objectives and decide whether to give it effect as an applicable standard. However, it should be noted that the civil consequences of a breach of statute have been subsumed into the law of negligence, and proof of a statutory breach causing damages is considered evidence of negligence only. [56]

These principles are illustrated in *McGeek Enterprises Ltd. v. Shell Canada Ltd.* [57] The Court in that case rejected the criteria contained in certain regulations as a standard by which the defendant's conduct was to be measured in deciding civil liability. The defendant, which had used its property as a gas station, sold the property to a real estate board, which in turn sold the property to the plaintiff. The plaintiff discovered soil contamination in an area that formally contained an underground storage tank. The plaintiff brought an action against the defendant in negligence as there was no agreement of purchase and sale between those parties and based its claim upon a statutory breach of duty. The plaintiff asserted that the defendant was in breach of a regulation promulgated under the *Gasoline Handling Act* [58] which required an owner of an underground storage tank which was no longer expected to be used to, among other things, remove any contaminated soil which was around or under the tank. While the Court accepted the opinion of the defendant's expert who concluded that the contamination on the site was insufficient to pose an appreciable risk to health, safety or the environment, the Court was compelled to find that the defendant was in breach of the regulation because all traces of the contaminant were not removed. Nevertheless, the Court held that the breach was insufficient for the purposes of imposing civil liability. The regulations would have required excavating the entire lot, which was considered an enormously expensive, impractical and inconsequential exercise for the safe use of the property. As a matter of policy, the Judge did not see merit in imposing civil liability on a party who failed to meet a statutory standard that was, in practical terms, unattainable and unnecessary. The Court held that civil liability is only to be imposed in circumstances where it has been proven, on a balance of probabilities, that the defendant's actions have fallen short of a suitable standard of reasonable care established by the evidence.

The corollary to the proposition that a breach of a statute will not automatically give rise to a finding of civil liability in negligence is that compliance with statutory, regulatory, or industry standards will not necessarily suffice to avoid liability. Compliance with statutory provisions does not replace a defendant's common law duty of care. [59] Where abandoned pipelines are involved, a pipeline operator will probably be held to the standards established for abandoning pipelines under the applicable legislation and the accepted practice of industry. Accordingly, it will presumably be sufficient in most circumstances to follow the established industry practices for abandoning a pipeline and, where appropriate, to leave the pipeline in place. Establishment of technical and engineering standards is, therefore, important because they will be persuasive evidence of the *prima facie* standard of care required on abandonment.

c. Pure Economic Loss

Economic loss is generally defined as costs which do not arise out of injury to persons or damage to property except for the defective property which is itself at issue. Until 1995, the Supreme Court of Canada adhered to the long-standing principle that purely economic loss was only recoverable in very narrow circumstances. That long-standing principle stems from *Rivtow Marine Ltd. v. Washington Iron Works* [60] in which the Supreme Court of Canada refused to award the plaintiff damages based on loss of profits and cost of repair arising from having to take a negligently constructed crane out of service. Laskin, C.J., however, in a strong dissent, wrote that there should be no distinction between liability for a product that had already injured someone and liability for a product that might injure someone if not made safe. Accordingly, he would have awarded the cost of making the crane safe. The English House of Lords followed the Laskin dissent in *Anns v. Merton London Borough Council* [61] and awarded damages for economic loss where the damage produced a risk of physical harm. This principle was later accepted by the Canadian courts, [62] which was reaffirmed in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.* [63] In that case, it was held that a building contractor, who is negligent in the construction of a building and the defects arising out of that negligence pose a "real and substantial danger" to the occupants of the building, is liable in tort for the reasonable costs of repairing the structure for the purpose of putting the building into a safe condition.

Applied to the matter at hand, this reasoning would appear to suggest that a land owner might be able to recover from a pipeline operator costs of performing further reclamation work on an abandoned pipeline which is likely to cause a "real and substantial danger" to the owner or third parties. If damage relates to persons or other property (other than the right-of-way itself), there will be a definite cause of action in negligence.

C. Liability and Property Interest Under the NEB Act

1. Liability Under Section 75

Section 75 of the NEB Act reads as follows:

> 75. A company shall, in the exercise of the powers granted by this Act or a Special Act, do as little damage as possible, and shall make full compensation in the manner provided in this Act and in a Special Act, to all persons interested, for all damage sustained by them by reason of the exercise of those powers.

The general powers of pipeline companies are set out in section 73 of the NEB Act, which reads as follows:

> 73. A company may, for the purposes of its undertaking, subject to this Act and to any Special Act applicable to it,
>
> > (a) enter into and on any Crown land without previous licence therefor, or into or on the land of any person, lying in the intended route of its pipeline, and make surveys, examinations or other necessary arrangements on the land for fixing the site of the pipeline, and set out and ascertain such parts of the land as are necessary and proper for the pipeline;
> >
> > (b) purchase, take and hold of and from any person, any land or other property necessary for the construction, maintenance and operation of its pipeline and alienate, sell or dispose of any of its land or property that for any reason has become unnecessary for the purpose of the pipeline;

(c) construct, lay, carry or place its pipeline across, on or under the land of any person on the located line of the pipeline;

(d) join its pipeline with the transmission facilities of any other person at any point on its route;

(e) construct, erect and maintain all necessary and convenient roads, buildings, houses, stations, depots, wharves, docks and other structures, and construct, purchase and acquire machinery and other apparatus necessary for the construction, maintenance and operation of its pipeline;

(f) construct, maintain and operate branch lines, and for that purpose exercise all the powers, privileges and authority necessary therefor, in as full and ample a manner as for a pipeline;

(g) alter, repair or discontinue the works mentioned in this section, or any of them, and substitute others in their stead;

(h) transmit hydrocarbons by pipeline and regulate the time and manner in which hydrocarbons shall be transmitted, and the tolls to be charged therefor; and

(i) do all other acts necessary for the construction, maintenance and operation of its pipeline.

Under Part V of the NEB Act, provision is made for determining compensation for the taking and using of lands by a pipeline company in the exercise of its powers as noted above. Depending on the type of lands involved, the party from whom consent is required and with whom compensation is to be negotiated for such taking and using varies.

The types of lands include Crown lands, Indian lands, settlement land, Tetlit Gwinch'in Yukon land, land subject to mining operations and freehold land. In the case of Crown lands (s. 77) and Indian Lands (s. 78), consent is required from the Governor in Council, as it is for settlement land (s. 78.1(1)) and Tetlit Gwinch'in Yukon land (s. 78.1(2)) provided such consent cannot be obtained from the Yukon first nation concerned or the Gwinch'in Tribal Council, respectively. Compensation may have to be paid to the owner, lessee or occupier of a mine (s. 83).

Not all of these parties fit within the classic conception of the term owner. Accordingly, section 85 of the *NEB Act* defines owner as "any person who is entitled to compensation under section 75", which in turn refers to "all persons interested". While this latter phrase is not defined, it is arguably intended to mean only those parties referred to above.

If the pipeline company is able to acquire lands for its pipeline by agreement with the appropriate interested party, the land acquisition agreement negotiated as between them is required to include a number of provisions set out in s. 86 of the NEB Act, including the following:

86(2)A company may not acquire lands for a pipeline under a land acquisition agreement unless the agreement includes provision for

...

(c) compensation for all damages suffered as a result of the operations of the

company;

(d) indemnification from all liabilities, damages, claims, suits and actions arising out of the operations of the company other than liabilities, damages, claims, suits and actions resulting from the gross negligence of the owner of the lands;...

While this provision sets out certain terms concerning liability for damages which must be included in a land acquisition agreement, the NEB Act does not stipulate a specific remedy for resolving all potential claims for damages which might arise from the operation of a pipeline. Accordingly, the question of liability and damages will in many instances fall to be determined according to common law principles.

If a pipeline operator and an interested party are unable to agree on any matter respecting compensation, a procedure is provided for negotiation and arbitration. [64] However, it remains that those procedures for determining compensation do not apply in respect of all damages which may result from the pipeline company's operations. The scope of the NEB Act's application in this regard is set out in s. 84:

84 The provisions of this Part that provide negotiation and arbitration procedures to determine compensation matters apply in respect of all damage caused by the pipeline of a company or anything carried by the pipeline **but do not apply to**

(a) claims against a company arising out of activities of the company unless those activities are directly related to

(i) the acquisition of lands for a pipeline,
(ii) the construction of the pipeline, or
(iii) the inspection, maintenance or repair of the pipeline;

(b) claims against a company for loss of life or personal injury; or

(c) awards of compensation or agreements respecting compensation made or entered into prior to March 1, 1983.

The effect of this provision is to limit the scope of compensation matters which can be determined by the specific procedures set out in the NEB Act. Those procedures are to be followed only for determining damages in relation to certain activities involved in the operation of the pipeline, which do not explicitly include abandonment, and do not include damages for injury or loss of life. [65] It follows that those claims for damages arising from the pipeline company's operations which are not determined by the procedures specified in the NEB Act are left to be determined at common law.

In any event, the abandonment of a pipeline may effect a lapse of the NEB's jurisdiction over it. This proposition was accepted by the Board in its Reasons for Decision MH-1-96. [66] The Board, while recognizing that a pipeline company is required to seek leave of the NEB to abandon a pipeline under s. 74 (d), noted that the NEB Act does not stipulate the legal consequences of an abandonment order. Those consequences, therefore, fell to be determined by general principles of law. Accordingly, the Board looked to the definition of "pipeline" in section 2 of the NEB Act, which reads as follows:

"pipeline" means **a line that is used or to be used for the transmission of oil or gas** alone or with any other commodity, and that connects a province with any other province or extends beyond the limits of a province or the offshore area as defined in section 123, and includes all branches, extensions, tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio and real and

personal property and works connected therewith;

The Board held that it ceases to have jurisdiction over a pipeline after it has been abandoned in accordance with the procedures mandated by the law as it is not "used or to be used for the transmission of oil or gas..."

Accepting that federal jurisdiction over the pipeline ceases once a pipeline company has obtained an abandonment order and disposes of its interest in the property containing the abandoned pipeline, it follows that an interested party will no longer have its remedies under the NEB Act and will have to rely on its remedies at common law.

2. Property Interest Under Section 111

Section 111 of the NEB Act provides as follows:

> 111 Notwithstanding this Act or any other general or Special Act or law to the contrary, where the pipeline of a company or any part of that pipeline has been affixed to any real property in accordance with the leave obtained from the appropriate authority as provided in subsection 108(2) or (6) or without leave pursuant to subsection 108(5),
>
> > (a) the pipeline or that part of it remains subject to the rights of the company and remains the property of the company as fully as it was before being so affixed and does not become part of the real property of any person other than the company unless otherwise agreed by the company in writing and unless notice of the agreement in writing has been filed with the Secretary; and
> >
> > (b) subject to the provisions of this Act, the company may create any lien, mortgage, charge or other security on the pipeline or that part of it. [67]

Under section 108 of the NEB Act, it is contemplated that a pipeline may be constructed on, over, under, or along certain Crown property or utilities. Section 111 is therefore put in place to preserve a pipeline company's interest in, and the statutory authority to construct, operate and maintain, a pipeline where it becomes affixed to that Crown property or any other utility as defined in the NEB Act. This provision was presumably put in place to eliminate any uncertainty as to the preservation of a pipeline company's property interest in a pipeline which arises at common law. This uncertainty stems from the principle of property law that if a chattel becomes sufficiently attached to land, it may be transformed into a fixture and thereby become part of the real property.

The determination of whether a chattel has been transformed into a fixture is a matter of objective intention. This intention is generally ascertained by examining the degree and purpose of the attachment to real property. Where a chattel is attached to land, even slightly, it raises a rebuttable presumption that it has become a fixture. [68] The ground for rebutting that presumption is the purpose of the annexation. The test, according to the leading case of *Stack v. T. Eaton Co.* [69] is whether the purpose of the attachment was to enhance the land, or for the better use of the chattel as a chattel.

If it is accepted that the NEB's ruling on the effect of the issuance of an abandonment order on its jurisdiction over a pipeline is correct, then presumably section 111 ceases to apply after pipeline abandonment. Accordingly, the question of whether or not the pipeline has become a fixture, and thus part of the real property of the Crown or a utility, is left to be determined by principles of property law.

There are a number of factors which weigh against a pipeline company's intention to maintain its property

interest in a pipeline, including the very act of abandonment in place, the time which may pass between abandonment and the eventual removal of the pipeline, and the degree of property damage which is required to effect the detachment of the pipeline from the land.

The ultimate determination of whether a pipeline becomes a fixture after abandonment will depend on the facts of a particular case and whatever agreements may be in place. However, a strong argument may be made that a pipeline company loses its property interest in the pipeline, particularly after some time has passed since the abandonment.

V. LAND TITLES REGISTRATION ISSUES

A. Registration of Easements

A pipeline easement can be registered under the *Land Titles Act*[70] in several ways:

1. by caveat;
2. by easement/utility right-of-way agreement;
3. by registered right-of-way plan; and
4. by having a fee simple certificate of title issued for those lands encompassed within a right-of-way.

Of those methods referenced above, the most common would presumably be by way of an easement/utility right-of-way agreement registered against the certificate of title to the lands of the land owner. Insofar as major undertakings are concerned, the lands encompassed under the right-of-way are delineated in a registered right-of-way plan, which plan is referenced in the easement/utility right-of-way agreement entered into with the land owner. In fact, section 31(d) of the NEB Act provides that no pipeline may be constructed until such time as a plan of the right-of-way lands is prepared and registered with the registrar of the applicable Land Titles Office. However, section 58 pipelines, which are pipelines not exceeding 40 kilometres in length, are normally exempted from the requirement. Further, there does not appear to be a similar requirement for provincially regulated pipelines.

At common law, an easement which is enforceable by and against successors in title to land can only be registered against title to the land in question if, among other things, there is a dominant tenement and a servient tenement referenced in the easement agreement. The servient tenement is subject to certain covenants and/or restrictions granted in favour of the dominant tenement. This requirement, however, of the need for a dominant and servient tenement does not fit in well with typical public or other utility easements where there generally is no dominant tenement. Section 72 of the *Land Titles Act* was enacted, which provides for the registration of an interest in land known as a utility right-of-way. This interest is most commonly granted for public utilities or oil and gas pipelines where there is a need for a continuous right-of-way over, under or across many parcels of land, as there is no dominant tenement in such a situation. In those circumstances, section 72 dispenses with the common law requirement of a dominant tenement by the enactment of a statutory provision to allow the granting of specified rights to specified entities.

A utility right-of-way is often referred to as an easement in that it grants to the grantee rights which are similar to rights granted under a common law easement. Since there is no dominant tenement, the utility right-of-way/easement is registered only against that land which is subject to the rights granted. Once it is registered, the right to use that land in accordance with the terms of the grant remains with the grantee pursuant to the terms of the agreement.

In certain instances, an easement/utility right-of-way may be registered by way of caveat by the pipeline company and, in rare cases, the holder of the pipeline right-of-way may be issued a certificate of title where

the pipeline company has been granted fee simple ownership of those lands encompassed within the right-of-way.

B. Discharge of Registration

Pipeline abandonment may terminate an easement, depending on its tenure, but this will not automatically discharge the registration. Regardless of which registration method is applicable, the discharge of an easement/utility right-of-way agreement, caveat or cancellation of a certificate of title does not come about simply because the pipeline which forms the subject matter of the utility right-of-way/easement has been abandoned. Further steps must be taken. [71]

Any instrument or caveat registered under the *Land Titles Act* or a certificate of title can be discharged or cancelled by Order of the Court of Queen's Bench of Alberta. This process, presumably, involves the applicant (in most cases the land owner) bringing a motion before the Court, which motion, together with supporting affidavit, would be served on the current holder of the benefits granted under the right-of-way agreement.

In the event the holder of a pipeline right-of-way agreement chooses to register its interest by way of caveat, the caveat can also be lapsed by a person having an interest in the land serving the caveator with a Notice to Take Proceedings on Caveat ("the Notice"). Unless the time for taking proceedings is shortened by Order of the Court, the caveator will have a period of 60 days following receipt of the Notice within which to commence an action to prove the validity of the caveat which is registered against title to the property in question. The Notice is served on the caveator at the address for service as indicated in the caveat which is registered against title. Should the caveator fail to commence the action to prove the validity of its caveat within the applicable time frame, the caveat can then be discharged upon the person who served the Notice satisfying the Registrar of the Land Titles Office (usually in the form of a statutory declaration) that service of the Notice was effected and that no steps have been taken by the caveator to prove its caveat within the applicable time period.

If the holder of a pipeline right-of-way has been issued a fee simple certificate of title for the lands in question, and thus is the owner of those lands, it would be extremely difficult for any person to have that certificate of title cancelled. Absent the owner of the lands covered by the certificate of title voluntarily agreeing to the cancellation of the title, the only circumstance under which such a certificate of title could be cancelled would be by Order of the Court and that the likelihood of such an Order being granted would be rare.

In what is presumably the most common situation, namely where a pipeline right-of-way agreement is registered by easement/utility right-of-way against the title to the lands in question, discharge of that instrument can only be effected upon receipt by the Land Titles Office of a release or discharge signed by the pipeline company under the right-of-way agreement.

In summary, any registration effected by the holder of a pipeline right-of-way, whether that registration is by way of caveat or easement/utility right-of-way or by the issuance of a fee simple certificate of title, cannot occur without some form of notice being provided to the grantee under the right-of-way agreement. As indicated above, pipeline rights-of-way will, in most instances, have been registered in the form of an easement/utility right-of-way coupled with the registration of a right-of-way plan setting forth the actual area of the right-of-way lands in question. In such a situation, a discharge of that encumbrance cannot occur without obtaining a Court Order or without the Land Titles Office being provided with a release or discharge signed by the pipeline company.

C. Recording of Information at Land titles Office

A registered right-of-way plan and easement/utility right-of-way are provided with registration numbers at the time of registration and any person wishing to obtain copies can do so by simply requesting copies from the applicable Land Titles Office in either Calgary or Edmonton by referencing the number of the plan. In the case of an easement/utility right-of-way, the area of the right-of-way lands can only be described by means of reference to a registered right-of-way plan or by means of a metes and bounds description of the right-of-way lands as prepared by a surveyor.

A utility right-of-way agreement which is registered by way of caveat is also given a registration number. However, the caveat may or may not refer to a registered right-of-way plan and may simply have attached to it a copy of the applicable right-of-way agreement, and, as part of that agreement, may have appended thereto a diagram showing the location of the right-of-way lands. The actual location of the right-of-way lands referenced in the caveat may or may not be accurate depending on the accuracy of the diagram utilized, as the area need not have been surveyed. In any event, that caveat and any attachments would be on file at the Land Titles Office and could be ordered by any person by referring to the registration number.

In the rare case of a pipeline company being issued with a certificate of title for the lands subject to the right-of-way, the title is given a registration number and the lands are identified by means of a legal description. The title can then be ordered by reference to the legal description.

Any land owner, or any other person, can obtain a copy of any registered right-of-way plan, any easement/utility right-of-way, any caveat or any certificate of title simply by requesting a copy of it from the applicable Land Titles Office. The Province of Alberta is divided into two registration districts, with the delineating line being located at approximately the Town of Innisfail. Any lands located north of Innisfail are dealt with in the North Alberta Land Titles Office in Edmonton, while lands south of Innisfail are dealt with in the South Alberta Land Titles Office in Calgary. [72] Title searches, on the other hand, can be obtained on-line through any private registry agent or, for example, most law offices which have a real estate practice.

Once an instrument or right-of-way plan is registered or a certificate of title issued, even though that instrument or plan may be subsequently discharged, or a certificate of title cancelled, the Land Titles Office maintains a record of those plans, caveats, instruments or titles indefinitely.

It is possible to order a current historical search of a certificate of title which discloses all instruments which are currently registered, or which had been registered, against that certificate of title, even though those instruments may have been discharged. In other words, it is possible to get a complete historical record of all encumbrances, plans or instruments which have been registered in respect of a certificate of title. This, however, only applies to the current certificate of title. Once the applicable registration number of an encumbrance, plan or instrument is known, it can simply be ordered by reference to that number from the applicable Land Titles Office.

In addition, it is possible to undertake a historical search of all certificates of title which have been registered at the Land Titles Office for a particular parcel of land. Each time a parcel of land is transferred, the existing certificate of title is cancelled and a new one issued in its place. A historical search of the current certificate of title may not disclose all instruments which have been registered at any time in respect of that parcel of land. It is possible, if the legal description for a particular property is known, to order copies of all certificates of title which have been issued since the time of the original grant from the Crown, to review those certificates of title and then to order copies of any encumbrances or plans which are disclosed as having been registered in respect of that particular parcel.

It is important to note that Land Titles cannot be searched by the name of the pipeline company or the pipeline. The location of the pipeline must be known, at least in part, to track down the instruments and

plans that were registered in respect of it.

[1] (1) It should be noted that a pipeline easement does not fit the essential characteristics of an easement at common law. The four characteristics essential to an easement at common law were set out by the English Court of Appeal in *Re Ellenborough Park*, [1956] Ch. 131, and are described as follows in S.G. Maurice's *Gale on Easements*, 15 ed. (London: Sweet & Maxwell, 1986) at p. 7:

1. There must be a dominant tenement (the land which enjoys the benefit of the easement) and a servient tenement (the land which is burdened).
2. An easement must accommodate the dominant tenement.
3. Dominant and servient owners must be different persons.
4. The easement must be capable of forming the subject matter of a grant.

In the context of a pipeline easement, the first two characteristics are generally not satisfied as there is no dominant tenement. This difficulty is overcome by section 72 of the *Land Titles Act*, R.S.A. 1980, c. L-5, which provides that if a registered owner of land grants to a corporation a right on, over or under the land for laying, constructing, maintaining and operating pipelines, the instrument granting the right may be registered at Land Titles. And, more significantly, the grantee has the right to use the land in accordance with the terms of the grant and that right runs with the land notwithstanding that the benefit of the right is not a appurtenant or annexed to any land of the grantee. See discussion below in Part V, Land Registration Issues.

[2] B. Ziff, *Principles of Property Law* (Toronto: Thomson Canada Limited, 1993) at p. 303.

[3] For example, such leave is required from the National Energy Board pursuant to section 74(1)(d) of the *National Energy Board Act*, R.S.C. 1985, c. N-7.

[4] *Supra*, note 2, at p. 285.

[5] [1971] S.C.R. 562.

[6] *Goldhar v. Universal Sections and Mouldings Ltd.* (1962), 36 D.L.R. (2d) 450 (Ont. C.A.).

[7] *Supra*, note 5, at 576.

[8] *Supra*, note 5, at 571.

[9] (1989), 65 Alta. L.R. (2d) 300 at 305 (Alta. C.A.).

[10] R.S.C. 1985, c. N-7. For a further treatment of these provisions, see discussion below.

[11] "Operation", in this context, will most likely take its meaning from the acts listed in the clause of the easement agreement which sets out the scope of the easement and the rights granted. These acts typically include the construction, operation, maintenance, alteration, removal, replacement, reconstruction and repair of the pipeline.

[12] It may be possible to argue that a cause of action founded on a breach of this provision arises shortly after the abandonment of the easement and, accordingly, that time begins to run sooner than later for the purposes of limitation periods.

[13] Under the easement agreement which was in issue in *Shelf Hldg. Ltd. v. Husky Oil Operations Ltd., supra*, note 9, the grantee was required, upon abandonment, to restore the surface of the lands to its original condition. The argument that removal of the pipeline is not required to effect the restoration contemplated under the agreement is easier to make on that wording than where

the obligation is to restore the lands.

[14] See *Shorter Oxford English Dictionary*, 3rd ed. (New York: Oxford University Press, 1973) at p. 1645.

[15] *Supra*, note 1. This should not be taken to mean that the covenants will continue to run with the land after the termination of the easement. See discussion below.

[16] *Supra*, note 1, at p. 48.

[17] *Supra*, note 2, at p. 217.

[18] [1990] 5 W.W.R. 489 (Man. C.A.), leave to appeal to S.C.C. refused [1991] 3 W.W.R. xxvii (S.C.C.).

[19] *Infra*, note 22.

[20] An assignee could only recover under the contract if he: (1) sued in the name of the assignor; (2) sued the assignor under the contract between them for what was promised under the assignment; or (3) forced the assignor to bring the appropriate proceedings against the other original party to the contract.

[21] G.H.L. Fridman, *The Law of Contract*, 3rd ed. (Toronto: Thomson Canada Limited, 1994) at p. 674.

[22] R.S.A. 1980, c. J.-1.

[23] According to S.M. Waddams, *The Law of Contracts*, 3rd ed. (Toronto: Canada Law Book Inc., 1993) at p. 177: "[A]n assignment that fails under the Act, for example because it is not absolute, or not made by a signed writing or because written notice is not given to the obligor, may yet be effective as an equitable assignment."

[24] (1956), 17 W.W.R. 404 at 408 (Alta. C.A.).

[25] [1903] A.C. 414 (H.L.).

[26] (1897), 28 S.C.R. 228 at 233 (S.C.C.).

[27] (1868), L.R. 3 H.L., 330.

[28] *Ibid*, at 279. The tort of strict liability is distinct from nuisance in that strict liability requires actual damage to the land, goods, or person of the plaintiff, while nuisance also encompasses inconvenience caused by the defendant's use of his or her land. Also, strict liability is unlike negligence in that no duty of care need be established and neither must it be shown that the defendant was careless in causing harm to the plaintiff.

[29] Notwithstanding that certain human activities may involve interference with land in its natural state, they do not necessarily constitute non-natural use. In Alberta, the distinction between natural and non-natural use appears to have been approached primarily from a perspective of the extent to which an activity is common or natural to a given community rather than focusing on the increased risk to others of that activity. For example, in *Maron et al v. R.A.E. Trucking et al* (1981), 31 A.R. 216 (Alta. Q.B.), the plaintiff asserted that the defendants should pay damages resulting from a fire on one of the defendant's property which started when fuel leaking from another defendant's truck undergoing welding repairs was ignited. The Court held that bringing the truck on the premises with fuel was not a non-natural use as the premises had been leased to one of the defendants for general use as a garage and welding business. See also *Grande et al v. Stoney Plain District Savings and Credit Ltd. et al* (1989), 118 A.R. 295, and *Modern Livestock Ltd. v. Elgersma* (1989), 69 Alta. L.R. (2d) 20. However, in *Schunicht v. Tiede*

(1979), 20 A.R. 606 (Alta. Q.B.), strict liability was found where a defendant farmer sprayed a herbicide from an airplane over his land and the spray drifted onto the plaintiff's land and damaged his crops. The Court also noted that, in any event, the defendant would be liable in negligence.

[30] [1913] A.C. 263 at 280 (P.C.)

[31] See *Heintzman & Co. v. Hashman Construction Ltd.* (1973), 32 D.L.R. (3d) 622 (Alta. S.C.), in which the defendant was held liable for damage caused by litter which fell from the building being constructed by the defendant onto the plaintiff's building.

[32] See *Ottawa Electric Co. v. Crepin*, [1931] S.C.R. 407.

[33] See *Sheels Brothers Lumber Co. v. Arnprior (Town)*, [1959] O.W.N. 305 (H.C.J.).

[34] In *Boudreau v. Irving Oil Co.* (1974), 9 N.B.R. (2d) 377 (N.B. C.A.), the owner of land adjacent to a service station discovered that his property was contaminated with gasoline. He sued the defendant oil company which owned the land and leased it to the station operator. The evidence indicated that the operator had experienced leakage problems at the pumps. Relying on *Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co.*, [1921] 2 A.C. 465 (H.L.), the Court dismissed the action against the oil company because it was not in occupation of the service station in its own right and, therefore, had no control over the gasoline that escaped.

[35] Generally speaking, a person is not vicariously liable for the negligence of an independent contractor he or she employs. However, this is not the case where the work ordered involves an inherent and obvious danger of injurious consequences unless properly done.

[36] (1974), 4 O.R. (2d) 735 (Ont. C.A.).

[37] *Ibid.*, at 739.

[38] R.F.V. Heuston, *Salmond on the Law of Torts*, 6 ed. (London: Sweet and Maxwell, 1973) at p. 68. However, the author states in a note that in some cases even an omission to repair may give rise to liability.

[39] See the words of Davie, C.J.A. in *Patterson v. Victoria (City)* (1897), 5 B.C.R. 628 at 645 (S.C.), on the subject of liability of public corporations in nuisance which depends on a positive act of misfeasance:

> If a public Corporation, by any act which it does, impedes or endangers the highway, it is said to be guilty of misfeasance; in other words, it causes a nuisance, for which it is just as responsible as any other wrongdoer who is not a public Corporation. It is not at all necessary to complete the responsibility of the Corporation that the nuisance should be attributable to any one act of the defendant's in particular, without which, apart from other circumstances, the nuisance would not have been occasioned, nor that it should be an act in the nature of trespass, nor, indeed, any act of commission at all. On the contrary, many of the cases in which the Corporations have been held liable for misfeasance are in respect of acts of omission only, which would have amounted to mere nonfeasance, had it not been for antecedent acts performed or sanction by the Corporation, but which in the public safety required to be guarded against.

[40] *Supra*, note 37, at pp. 51-52. The defendant need not necessarily be the owner or occupier of that land as evidenced by *Jackson v. Drury Construction Co., supra*, note 36.

[41] [1985] 3 W.W.R. 47 (B.C.S.C.).

[42] However, the defendant was still liable in trespass and for loss of vertical support.

[43] (1989), 65 Alta. L.R. (2d) 300 at 313 (Alta. C.A.). The Court held unanimously in that case that a grant of right-of-way was an "easement" and "not a grant but an interest in land yielding exclusive rights consistent with ownership." Haddad, J.A. stated at 314:

> The rights granted to Husky do not detract from the rights of the servient owner with the force required to raise the grant above the status of an easement. The grant is free of the words "appropriate" and "exclusive use" or words of that connotation. I view the document as having been devised to ensure that the servient owner's proprietary rights in the corridor are preserved.

[44] See *Ontario (Attorney General) v. Tyre King Tyre Recycling.* (1992), 9 O.R. (3d) 318 (Gen. Div.), in which a mortgagee not in possession of the property was found not responsible for private nuisance created by the mortgagor.

[45] *Smith v. Scott*, [1972] 3 All E.R. 645, at 648-49.

[46] [1940] A.C. 880 (P.C.).

[47] See also *Centre Star Mining Co. v. Rossland-Kootenay Mining Co.* [1905] W.W.R. 313 (B.C.C.A.), where the defendant's predecessor in title had trespassed from its own lands onto the plaintiff's and extracted minerals therefrom. In the process of trespassing, the predecessor in title created an unnatural water course which flooded the plaintiff's mine. The plaintiff sued the new owner for both the trespass and the water nuisance. The Court held that the new owner could not be liable for the trespass, but said that it was liable to abate the water nuisance created by its predecessor in title. The Court granted the plaintiff an injunction that required the new owner to stop the continuing nuisance.

[48] *Supra,* note 37, at p. 65.

[49] [1966] 2 All E.R. 989 (P.C.), at 994.

[50] *Ibid.*, at 996.

[51] [1932] A.C. 562 at 580 (H.L.).

[52] The concept of foreseeability is illustrated in *Nova Mink Ltd. v. Trans-Canada Airlines*, [1951] 2 D.L.R. 241 (N.S. C.A.), in which the plaintiff mink rancher brought an action against the defendant airline for an injury to his business caused by the defendant's low flying aircraft. The defendant maintained that it was unaware of the existence of the plaintiff's ranch and had no knowledge of the sensitivity of the plaintiff's operation. The Court held that the defendant owed no duty of care to the plaintiff because the plaintiff was not a reasonably foreseeable victim of the defendant's action.

[53] [1995] 3 W.W.R. 85 (S.C.C.). The defendant was a general contractor for the construction of an apartment building which was acquired by the plaintiff and converted into condominiums four years later. A number of years later, a storey-high section of cladding plunged nine stories to the ground below. The condominium corporation had the entire cladding removed and replaced at a cost of $1.5 million dollars. The condominium corporation sued, among others, the general contractor in the tort of negligence. The issue before the Supreme Court of Canada was whether a general contractor could be held tortiously liable in negligence to a subsequent purchaser of the building, who is not in contractual privity with the contractor, for the costs of repairing defects in the building arising out of negligent construction. LaForest, J. stated at 106 that builders were *prima facie* under a duty in tort to subsequent owners for the costs of repairing defects that posed "a real and substantial danger to the inhabitants of the building." LaForest, J. held that there was no consideration to negative or reduce the contractors duty in any way. He indicated that any concern that the imposition of tortious liability might subvert contractual relationships have little foundation when the structure in question was dangerous rather than merely constructed below some contractual standard of quality. LaForest, J. determined that the contractor would not be exposed to liability of an indeterminate amount for an indeterminate time to an indeterminate class: the class of potential plaintiffs was restricted to future inhabitants of the building; the amount of recovery was restricted to the reasonable costs of restoring the building to a safe state; and the time was restricted to the useful life of the building.

[54] [1977] 2 All E.R. 492 at 498-99 (H.L.). While that case has been overruled in England, it continues to find favour in Canada.

[55] *Arland v. Taylor*, [1955] O.R. 131 at 142 (C.A.).

[56] *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205.

[57] (1991), 8 C.E.L.R. (N.S.) 138 (Gen. Div.).

[58] R.S.O. 1980, c. 185.

[59] See *Paskiviski v Canadian Pacific Ltd.*, [1976] 1 S.C.R. 687.

[60] [1974] S.C.R. 1189.

[61] *Supra*, note 53.

[62] See *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2.

[63] *Supra*, note 52.

[64] The negotiation proceedings are described in sections 88 and 89, and the arbitration proceedings in sections 90 to 103. An award of compensation made by an Arbitration Committee is also required to include provisions for those matters referred to in s. 86.

[65] The negotiation and arbitration procedures under the NEB Act are apparently intended to address only those matters which are typically addressed in provincial surface rights legislation. This is evidenced by the list of factors to be considered by an Arbitration Committee in determining compensation matters provided under s. 97 of the NEB Act, which include: market value of the lands taken, loss of use, adverse effect, nuisance, reasonably expected damage to land adjacent to the lands taken, loss of or damage to livestock or other personal property, special difficulties arising from relocation, or other such factors which are considered proper in the circumstances.

[66] Manito Pipelines Ltd Application to Abandon Certain Facilities dated 31 January 1996, NEB Reasons for Decision MH-1-96, July 1996.

[67] The term "appropriate authority" is defined in section 108 to mean: (a) the Minister of Transport with respect to a navigable water, (b) National Transportation Agency with respect to a railway, and (c) the Board with respect to any other utility.

The term "utility" is also defined in that section to mean a navigable water, a highway, a railway, an irrigation ditch, a publicly owned or operated drainage system, sewer or dike, and underground telegraph or telephone line or a line for the transmission of hydrocarbons, electricity or any other substance.

[68] Thus, following the termination of a lease, a landlord may become entitled to fixtures placed on the premises by the tenant. However, intention must be determined objectively. Such intention may be expressed in the lease itself, but its is important to note that whether a chattel becomes a fixture cannot be determined by contract insofar as all the world is concerned, but may do so as between the parties to the contract themselves: see *Maple Leaf Coal Co.*, [1951] 4 D.L.R. 210 (Alta. C.A.), at 214.

[69] (1902), 4 O.L.R. 335 (Ont. Div. Ct.).

[70] R.S.A. 1980, c. L-5.

[71] It is important to note that registration itself does not constitute the interest in land and discharge equally does not determine it.

[72] Although requests can be submitted through either Land Titles Office and search requests will be forwarded to the applicable Office.

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